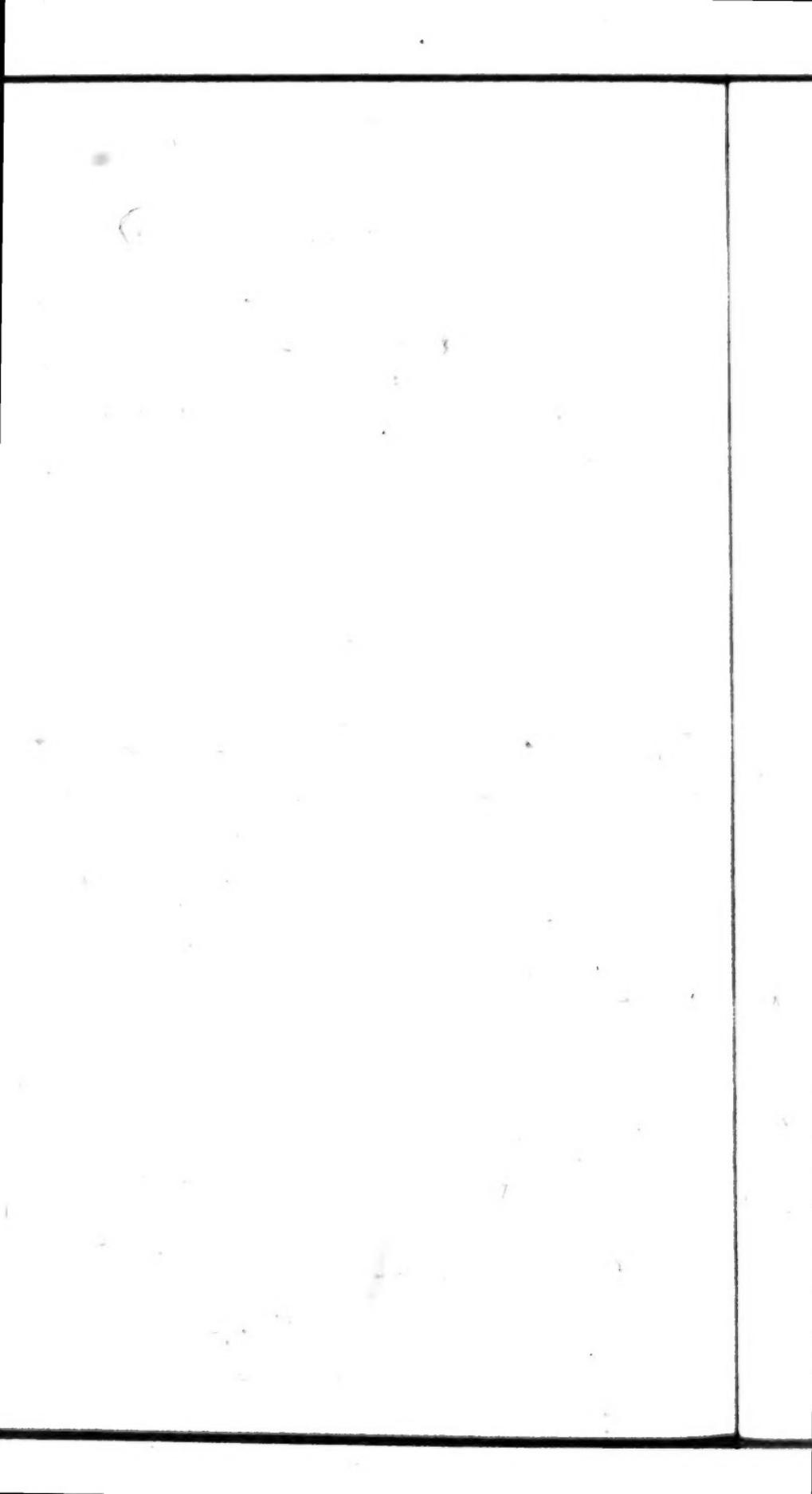


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**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

July 20, 1972—Information of District Attorney filed in Circuit Court of State of Oregon for Multnomah County.

July 20, 1972—Arraignment and Plea.

July 20, 1972—Judgment of Court and Probation Order.

August 21, 1972—Petitioner files Notice of Appeal.

January 12, 1973—Opinion of the Oregon Court of Appeals.

February 8, 1973—Letter of Court of Appeals denying Petition for Rehearing.

May 22, 1973—Letter of Oregon Supreme Court denying Petition for Review.

December 17, 1973—Letter of United States Supreme Court granting Petition for Writ of Certiorari.

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

No. C 72-05-1685 Cr

THE STATE OF OREGON, PLAINTIFF

vs.

PRINCE ERIC FULLER, DEFENDANT

INFORMATION—Filed July 20, 1972

The above defendant(s) is accused by this information of the crime of SODOMY IN THE THIRD DEGREE committed as follows:

The said defendant(s), on or about the 23rd day of May, 1972, in Multnomah County, Oregon, did unlawfully and knowingly cause Sandra Webb, a person under the age of 16 years, to engage in deviate sexual intercourse with the said defendant by causing the sex organs of the said Sandra Webb to be brought into contact with the mouth of the said defendant, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated at Portland, Oregon, in the County aforesaid this 20th day of July, 1972.

• • • •

ARRAIGNMENT and PLEA—Filed July 20, 1972  
[Caption Omitted in Printing]

On July 20, 1972, this case came before the court for arraignment on the Information of District Attorney on Waiver of Indictment heretofore duly presented and returned to this court, the State of Oregon appearing by the District Attorney, and the above-named defendant appearing in person and with his attorney, Jonathan T. Harnish. Said defendant was duly arraigned by the District Attorney under the court's direction, and waiving further time in

which to plead, now pleads GUILTY to the crime charged in said Information, to-wit: SODOMY IN THE THIRD DEGREE.

IT IS ORDERED that said plea of GUILTY be entered of record herein.

• • •  
PERTINENT PORTIONS OF THE TRIAL RECORD

Filed September 20, 1972

[Caption Omitted in Printing]

THE COURT: Mr. Fuller, I understand you have never been incarcerated in a penitentiary anywhere in the country.

MR. FULLER: No, your Honor, I haven't.

THE COURT: The only confinement you have had is in this case, a total of one month in Rocky Butte waiting trial here?

MR. FULLER: Yes, your Honor.

THE COURT: I understand you are now going to Portland Community College?

MR. FULLER: I was at the time of my arrest. I am going to try to attend to take my final examination, which I wasn't able to because I was incarcerated at the time.

THE COURT: So you missed your final examination.

MR. FULLER: Yes.

THE COURT: Have you talked to your professors out there?

MR. FULLER: No, I haven't.

THE COURT: Now, your attorney tells me that you are from Pennsylvania and your family lives in Pennsylvania.

MR. FULLER: Yes.

THE COURT: Philadelphia.

MR. FULLER: Yes.

THE COURT: Do you plan to stay here in Oregon?

MR. FULLER: I have not planned to stay in Oregon. I had — I have applied to some colleges in California for the purpose of—being less expensive and also for personal reasons I was going to go to school in California this fall term.

THE COURT: How are you paying your way through school?

MR. FULLER: GI BILL.

THE COURT: How much a month do you get?

MR. FULLER: \$175.

THE COURT: Plus your tuition?

MR. FULLER: No, that is complete. That is for tuition and everything.

THE COURT: So you have to pay your board and room and tuition out of the \$175 a month?

MR. FULLER: Yes.

THE COURT: Have you been working in addition to your school work?

MR. FULLER: Oh, I have been selling some posters.

THE COURT: Some what?

MR. FULLER: Some posters. And some silk screen work some friends of mine did on a commission basis to some stores here in town, gift shops.

THE COURT: You have been doing that to supplement your income. I take it.

MR. FULLER: Yes.

THE COURT: All right.

Mr. Fuller, the Court is going to suspend the imposition of sentence in your case and place you on probation for a period of five years.

The conditions of probation will be as follows: One, that you be confined to the Multnomah County Correctional Institution for a period of one year and the confinement will be such that you can continue to go to school at Portland Community College, if that is your wish, or some other school in Oregon. It will have to be some school in Portland. The Portland Community College is out toward Gresham and would be closer to where you are to be confined. However, it is the Court's understanding the Correctional Institution is going to be moved in the next month or two.

Be that as it may. You will serve one year in the Multnomah County Correctional Institution followed by five years' probation.

As a further condition the Court is going to require you to pay your attorney's fees to Mr. Harnish.

Now, Mr. Harnish, as I understand you were Court appointed in this case. Is that right?

MR. HARNISH: Yes, your Honor.

THE COURT: I would think that the defendant and his family ought to be willing to pay the attorney's fees and the costs incurred.

Were there any other costs incurred?

MR. HARNISH: There was an investigator.

THE COURT: That is the one that you employed?

MR. HARNISH: Yes.

THE COURT: How much money have you got involved in that?

MR. HARNISH: \$375.

THE COURT: \$375.

I am just wondering, have you discussed this matter with Mr. Fuller, Sr., as to whether he would consider paying these expenses and have his son pay them back to him when he can afford it.

MR. HARNISH: I have as to the investigator, and that is all.

THE COURT: And has he indicated his willingness to do that?

MR. HARNISH: Yes, your Honor.

THE COURT: So the expenses would be the investigator's fee and the attorney's fee?

MR. HARNISH: Yes.

THE COURT: I want him, the defendant, Mr. Fuller, to pay the attorney's fees, too. I don't think the taxpayers of Multnomah County should be saddled with this responsibility where there are family resources.

Is Mr. Fuller in the courtroom, Mr. Fuller, Sr.?

MR. HARNISH: Yes, he is.

THE COURT: Do you want to have a minute to talk with him and see if he is willing to advance these funds and have his son pay them back to him as his earnings would justify?

MR. HARNISH: All right.

THE COURT: You just take a minute.

(Pause.)

MR. HARNISH: Your Honor, we have come to an agreement. He will reimburse me for my attorney's fees.

THE COURT: All right.

Then I assume any arrangement for paying back the attorney's fees can be made between Mr. Fuller and his son here. All right.

And, then, the order ought to provide, Mr. Ashenfelter, that the defendant will pay for the cost of the investigator, which was \$375, and pay his own attorney fees to Mr. Harnish.

(Tr 7-13)

\* \* \* \*

**JUDGMENT OF THE COURT AND PROBATION ORDER—****Filed July 20, 1972****[Caption Omitted in Printing]**

On July 20, 1972, this matter came before the court, the plaintiff appearing by Dennis D. Ashenfelter, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, Jonathan T. Harnish.

IT IS ADJUDGED that the said defendant has been convicted on his plea of GUILTY of the offense of SODOMY IN THE THIRD DEGREE, and waiving further time before imposition of sentence.

IT IS FURTHER ADJUDGED that imposition of sentence is suspended and defendant placed on probation to the Corrections Division of the State of Oregon for a period of Five (5) Years from this date, on condition that he report as often as directed to said Corrections Division, abide by all the rules and regulations of said Corrections Division, and not again violate any laws, and on the further conditions: (1) that he be imprisoned in the Multnomah County Jail for a period of One (1) Year, and it is the recommendation of the court that he be incarcerated in the Multnomah County Correctional Institution, and admitted to the work release program or similar release program for educational purposes, and said defendant is to report to the Multnomah County Jail by Monday, July 24, 1972 at 10:00 a.m., (2) that the defendant reimburse Multnomah County for the cost of his attorney's fees, and (3) that the defendant reimburse Multnomah County for investigator's expenses in the amount of \$375.

IT IS ORDERED that based on the within guilty plea and judgment on the District Attorney's Information on Waiver of Indictment, the indictment herein charging said defendant with the crime of Count I—RAPE IN THE FIRST DEGREE AND COUNT II—SODOMY IN THE FIRST DEGREE is hereby dismissed.

IT IS FURTHER ORDERED that any bond heretofore posted herein by said defendant is exonerated.

/s/ **ALFRED T. SULMONETTI**  
*Judge*

\* \* \*

**NOTICE OF APPEAL—Filed August 21, 1972****[Caption Omitted in Printing]**

Notice is hereby given that the above named defendant-appellant, Prince Eric Fuller, represented by J. Marvin Kuhn, appeals to the Court of Appeals of the State of Oregon from the judgment heretofore entered in the circuit court of the state of Oregon for Multnomah County on the 20th day of July, 1972, and from the whole thereof.

Defendant-appellant designates the following portions of the record in addition to the trial court file: All of the testimony offered and received at the arraignment, plea and sentencing proceedings, and all other appearances whatsoever in the above entitled case.

*/s/ J. MARVIN KUHN  
Deputy Public Defender*

• • • •

**IN THE COURT OF APPEALS OF THE STATE OF OREGON**

**STATE OF OREGON, RESPONDENT**

v.

**PRINCE ERIC FULLER, APPELLANT**

**OPINION—Filed January 12, 1973**

SCHWAB, C. J.

The sole question in this appeal which merits discussion is whether a sentencing court has authority to include among the conditions of probation the requirement that a defendant repay attorney fees and investigator fees that the county expended on his behalf because he was indigent at the time of trial. Such a sentence is authorized by ORS 161.665, 161.675 and 161.685,<sup>1</sup> enacted by the legislature in

<sup>1</sup> ORS 161.665 provides:

- “(1) The court may require a convicted defendant to pay costs.
- “(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.
- “(3) The court shall not sentence a defendant to pay costs unless the

1971. Oregon Laws 1971, ch 743, §§ 80, 81 and 82, p 1899.  
Relying on James v. Strange, 407 US 128, 92 S Ct 2027, 32

defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675."

ORS 161.675 provides:

"(1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified installments. If no such permission is included in the sentence the fine shall be payable forthwith.

"(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence."

ORS 161.685 provides:

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any installment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each \$25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

L. Ed 2d 600 (1972), defendant argues it is unconstitutional to require repayment of such fees as part of a sentence.

The Supreme Court in James v. Strange, *supra*, held a Kansas statute providing for recoupment of attorney fees from indigent defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, the sole basis for this holding was that the Kansas law did not allow indigent defendants ordered to pay such fees all of the exemptions from execution provided for other judgment debtors. The court did not hold that a statutory scheme for recoupment of attorney fees on its face violated the Equal Protection Clause. Neither did it find such statutes on their face impaired a defendant's Sixth Amendment right to counsel.

ORS 161.665(1) and 161.665(3) read together authorize a sentencing court to require a convicted defendant to repay certain costs if he is or will be able to pay them. A sentence requiring repayment of costs is never mandatory. Normally, the judgment for costs is docketed as a judgment in a civil action and enforced in the same manner as a civil judgment. ORS 137.180; <sup>2</sup> ORS 137.450; <sup>3</sup> ORS 161.685(6). Alternatively, ORS 161.675(2) provides that when a defendant sentenced to repay costs is also placed on proba-

<sup>2</sup> (5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

<sup>3</sup> (6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

<sup>2</sup> ORS 137.180 provides:

"A judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect, as provided in ORS 18.320, 18.350 and 18.400."

<sup>3</sup> ORS 137.450 provides:

"A judgment against the defendant in a criminal action or the private prosecutor, so far as it requires the payment of a fine or costs and disbursements of the action, or both, may be enforced as a judgment in a civil action."

tion the court *may* make repayment of the costs a condition of probation. In this case defendant received the sentence authorized by ORS 161.675(2). His contention that such a sentence is invalid presents three issues.

(1) Are fees of appointed defense attorneys and investigation "costs" which may be assessed against a convicted defendant under ORS 161.665?

(2) Is such a statute inconsistent with defendant's right to counsel or to equal protection of the laws?

(3) Assuming a civil recoupment statute is valid under the Sixth and Fourteenth Amendments to the United States Constitution, is the repayment of costs as a condition of probation involving possible imprisonment under certain circumstances for nonpayment impermissible under the Equal Protection Clause?

(1)

The costs that a defendant may be required to repay are defined in ORS 161.665(2) as follows:

"Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law."

The state submits that the costs "specially incurred" in prosecuting a defendant include the costs of providing a court-appointed counsel and the payment of investigator's expenses. These are, in fact, the principal expenses which the state "specially" incurs in prosecuting an individual defendant. The statute specifically excludes a jury fee or the costs of summoning jurors. In addition, most of the costs of the prosecution side of the case are excluded from consideration as costs. The "costs of prosecution" specifically do not include district attorneys' salaries, sheriffs' salaries, jurors' fees, police investigations, etc. See, [sic] Minutes, Criminal Law Revision Commission Meeting, May 14, 1970, pp. 27-30. Although the services of any attorney and investigator are used by and for a defendant's benefit in the first instance, they are costs which the state or county

must pay if an indigent defendant is to be prosecuted. They are thus costs which are assessable as part of the sentence in a proper case.\*

(2)

Argersinger v. Hamlin, 407 US 25, 92 S Ct 2006, 32 L Ed 2d 530 (1972), Gideon v. Wainwright, 372 US 335, 82 S Ct 792, 9 L Ed 2d 799, 93 ALR2d 733 (1963), and Stevenson v. Holzman, 254 Or 94, 458 P2d 414 (1969), all hold that a defendant facing trial which may result in imprisonment has the right to be represented by counsel, and that right cannot be denied him on the ground of indigency. No case says that counsel must be provided if the defendant has the ability to pay for counsel, but simply chooses not to spend the money for attorney fees. Neither does any decision of the United States or Oregon Supreme Court hold that the state may not recoup the cost of counsel fees if a defendant later becomes able to repay them.

Oregon's recoupment statute provides that a defendant shall not be sentenced to repay costs "unless the defendant is or will be able to pay them," and that the court may consider "the nature of the burden that payment of costs will impose," including "manifest hardship on the defendant or his immediate family." ORS 161.665(3) and (4). Thus, an indigent defendant is entitled to free counsel immediately (which is when he needs it), but may be later required to repay this cost if he "is or will be" able to do so, that is, if he has ceased or likely will cease to be indigent. A defendant is not denied counsel while he is indigent, and he is required to repay appointed counsel's fee only if and when he is no longer indigent. If there is no likelihood that a defendant's indigency will end, a judgment for costs cannot be imposed. ORS 161.665(3). If there appears to be the future possibility of ability to repay at the time of sentencing, but the defendant remains an indigent, the judg-

\* It is clear from the Proposed Criminal Code, § 80, pp 76-7, that the Criminal Law Revision Commission intended the "costs" defined in ORS 161.665(2) include the costs of legal assistance furnished an indigent. Former ORS 137.205 provided for taxation against a defendant for the cost of legal assistance furnished to him, and the Proposed Criminal Code states, see Table, p XXV, that the intent of the Commission was that the substance of former ORS 137.205 be retained by placing it in what is now ORS 161.665(2).

ment for costs cannot be collected. The court retains jurisdiction to determine ability to pay. No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes. ORS 161.665 to QRS 161.685 neither denies a defendant the right to counsel, nor discriminates against him because of poverty.

## (3)

Where payment of costs is made a condition of probation the possibility exists that a defendant may not only have judgment for the costs entered against him, but he may, in fact, be subject to revocation of his probation. However, it is clear from the tenor of the recoupment statute that the discretion of the trial court to revoke probation for nonpayment of costs is sharply limited. Such revocation may only occur if the court specifically finds: (1) the defendant has the present financial ability to repay the costs involved (either all or by installments) without hardship to himself or his family, *cf.*, ORS 161.665(4); *and* (2) the defendant's failure to repay (either all or by installments) is an intentional, contumacious default, *cf.*, ORS 161.665(4). If the evidence adduced at a revocation hearing does not establish both of the above elements, not only is revocation improper, but the trial court may well consider remission of the unpaid costs pursuant to ORS 161.665(4). Given these substantial limitations on a trial court's authority to revoke probation for nonpayment of costs, we perceive no constitutional infirmity with a sentence that places a defendant on probation on condition that he repay costs.

A sentencing court may very possibly consider the repayment of the expenses of prosecution, like that of restitution to the victim of crime, ORS 137.540(1),<sup>5</sup> rehabilitative. We see no good reason why a defendant should have the right to refuse to make restitution or pay costs imposed against him as a result of his own wrongdoing if in the future it is

<sup>5</sup> ORS 137.540(10) provides:

"The court shall determine, and may at any time modify, the conditions of probation, which may include, as well as any others, that the probationer shall:

"(10) Make reparation or restitution to the aggrieved party for the damage or loss caused by offense, in an amount to be determined by the court."

determined that his circumstances have changed so that he is able to pay without any hardship to himself or his immediate family. In many instances rehabilitation may involve a defendant's doing the best he can to redress his victims, which may include both a particular victim and society as a whole.

We are aware that the Supreme Court of the state of California has decided this issue to the contrary in *Re Allen*, 71 Cal2d 388, 78 Cal Rptr 207, 455 P2d 143, *cert denied* 396 US 994 (1969), but for the reasons indicated above, we are not persuaded by that opinion.\*

Affirmed.

FORT, J., dissenting.

In *In re Allen*, 71 Cal 2d 388, 78 Cal Rptr 207, 455 P2d 143, *cert denied* 396 US 994 (1969), as the majority points out, the Supreme Court of California considered, though under a different statute, the basic problem here decided by the majority decision.

After a discussion of United States Supreme Court decisions, the California court said:

"We conclude that the imposition of the condition under attack constitutes an impediment to the free exercise of a right guaranteed by the Sixth Amendment to the Constitution and as with respect to other im-

\* The opinion of the California Supreme Court indicates that at least as of the date of that opinion California had no recoupment statutes similar to Oregon's.

"The condition of probation under attack is the requirement that the petitioner 'reimburse the County of San Mateo for court-appointed counsel through the Probation Department.'

"Section 1203.1 of the Penal Code provides for the terms and conditions which a court may impose in the granting of probation and prescribes the statutory limits upon the exercise of the trial court's discretion in connection therewith. Since the section does not expressly authorize the imposition of the particular condition under attack here we must assume that the court deemed it authorized under the omnibus clause 'and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer \* \* \*.' (Italics added.)" *In Re Allen*, 78 Cal Rptr at 207-08.

pediments or forms of compulsion against the exercise of such rights may not be permitted by the courts.

“ \* \* \* \* \* ”  
 “It would appear utterly inconsistent to advise a defendant of his entitlement to the free service of counsel and later to exact repayment through the medium of a condition of probation. *Miranda* (p. 491 [16 L. Ed.2d p. 733] made clear that where ‘rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.’ ” 71 Cal 2d at 391, 393.

*See also:* Opinion of the Justices, 109 NH 508, 256 A2d 500 (1969).

The majority opinion also refers to the recent United States Supreme Court case of *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972). A three-judge federal court had concluded<sup>1</sup> that a Kansas statute relating to recoupment from indigent defendants was unconstitutional because it found “it to be an impermissible burden upon the right to counsel established in *Gideon v. Wainwright*.”

The Supreme Court upon review did not reach that question. Instead, it first pointed out that

“[t]his case presents a constitutional challenge to a Kansas recoupment statute, whereby the State may recover in subsequent civil proceedings counsel and other legal defense fees expended for the benefit of indigent defendants. \* \* \*” (Emphasis supplied.) 407 US at 128.

Then in a unanimous opinion it concluded that the statute was unconstitutional on the narrow ground, as the majority points out, that the Kansas statute denied a defendant equal protection because it also denied him exemptions from execution provided for other debtors. Nothing in the challenged statute here affords the defendant in a revocation proceeding to the exemptions provided debtors generally under Oregon law. Nothing in ORS 137.550, governing revocation proceedings, supports such a construction.

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<sup>1</sup> *Strange v. James*, 323 F Supp 1230 (1971), *aff'd* 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972).

Thus I am unable to distinguish the Oregon law (ORS 161.675(2) [sic] from the Kansas statute held void in *James*. Accordingly, under *James v. Strange, supra*, I conclude that ORS 161.675(2), when read together with ORS 137.550, denies the defendant here the equal protection of the laws.

Furthermore, concerning the Sixth Amendment right to counsel, the court in *James v. Strange, supra*, stated:

“\* \* \* Whether the statutory obligations for repayment impermissibly deter the exercise of this right is a question we need not reach, for we find the statute before us constitutionally infirm on other grounds.”  
407 US at 134.

In this connection, a crucial distinction, in my view, between our statute and the Kansas recoupment statute is that the latter is civil in nature. Here we are dealing with a statute which makes the recoupment right a part of the criminal procedure. ORS 161.275(2). Under this holding the court permits the recoupment obligation to be imposed in the judgment as a condition of probation, for violation of which a defendant may be incarcerated. In effect, therefore, it may reasonably be argued that it allows imprisonment for a debt owed to the state.

It must be remembered that in all cases of court-appointed counsel, at the time of sentence a defendant stands before the court as an indigent. Excerpts from the transcript of the sentencing procedure here are illustrative of how, with the best intentions, pressures resulting from recoupment demands, when viewed from the standpoint of a defendant or his family, might indeed seem, and thus become, inhibiting.<sup>2</sup>

<sup>2</sup> Here the 25-year-old defendant's plea to third degree sodomy was entered following the filing of an information on waiver of indictment. The defendant had been furnished a court-appointed attorney after a finding by the court that he was indigent.

The transcript contains the following relating to the terms of probation:

“[THE COURT:] As a further condition the Court is going to require you to pay your attorney's fees to Mr. Harnish.

“Now, Mr. Harnish, as I understand you were Court appointed in this case. Is that right?

“MR. HARNISH: Yes, your Honor.

THE COURT: I would think that the defendant and his family ought

I agree that the term "costs" as used in ORS 161.665 includes items other than attorney fees. ORS 161.665(2). For example, the law allows an indigent defendant in connection with a plea of insanity to employ at state expense a psychiatrist or psychologist. He is entitled in an appropriate case to the services of a handwriting or ballistics expert. The defendant may, as here, employ an investiga-

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to be willing to pay the attorney's fees and the costs incurred.

"Were there any other costs incurred?

"MR. HARNISH: There was an investigator.

"THE COURT: That is the one that you employed?

"MR. HARNISH: Yes.

"THE COURT: How much money have you got involved in that?

"MR. HARNISH: \$375.

"THE COURT: \$375.

"I am just wondering, have you discussed this matter with Mr. Fuller, Sr., as to whether he would consider paying these expenses and have his son pay them back to him when he can afford it.

"MR. HARNISH: I have as to the investigator, and that is all.

"THE COURT: And has he indicated his willingness to do that?

"MR. HARNISH: Yes, your Honor.

"THE COURT: So the expenses would be the investigator's fee and the attorney's fee?

"MR. HARNISH: Yes.

"THE COURT: I want him, the defendant, Mr. Fuller, to pay the attorney's fees, too. I don't think the taxpayers of Multnomah County should be saddled with this responsibility where there are family resources.

"Is Mr. Fuller in the courtroom, Mr. Fuller, Sr.?

"MR. HARNISH: Yes, he is.

"THE COURT: Do you want to have a minute to talk with him and see if he is willing to advance these funds and have his son pay them back to him as his earnings would justify?

"MR. HARNISH: All right.

"THE COURT: You just take a minute.

"(Pause.)

"MR. HARNISH: Your Honor, we have come to an agreement. He will reimburse me for my attorney's fees.

"THE COURT: All right.

"Then I assume any arrangement for paying back the attorney's fees can be made between Mr. Fuller and his son here. All right.

"And, then, the order ought to provide, Mr. Ashenfelter [deputy district attorney], that the defendant will pay for the cost of the investigator, which was \$375, and pay his own attorney fees to Mr. Harnish."

Repayment of both by the defendant was then expressly included as conditions two and three in the judgment order. This also, after suspending sentence for five years, imposed as a condition of probation that defendant serve one year in the county jail.

tor<sup>3</sup> upon a proper showing. He may subpoena witnesses, either lay or expert, when warranted, to testify at his trial. Under the court's holding here, if he loses he faces the prospect of finding himself not only heavily indebted to the state for having in good faith utilized the adversary system to the best of his ability, but liable to imprisonment for his failure to pay, regardless of any exemptions to which he might otherwise be entitled, even though he has otherwise complied with the conditions of his probation. I believe that possibility could well inhibit a defendant, particularly in matters carrying a lesser penalty, from exercising to the full the rights guaranteed to him not only under the Sixth Amendment but also under concepts of fundamental fairness enshrined in the Fifth and Fourteenth Amendments. In my view it constitutes an invidious discrimination between the indigent defendant and the well-to-do defendant.

Accordingly, I respectfully dissent.

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<sup>3</sup> The judgment here also included an order requiring defendant as a condition of probation to pay Multnomah County \$375 for investigator's expenses.

**LETTER OF COURT OF APPEALS**

**Filed February 8, 1973**

**[Caption Omitted in Printing]**

**Mr. J. Marvin Kuhn  
Deputy Public Defender  
Labor & Industries Building  
Salem, Oregon**

**Re : State v. Prince Eric Fuller**

**Dear Mr. Kuhn :**

The Court of Appeals has today denied appellant's petition for rehearing in the above case.

**Very truly yours,**  
**/s/ J. DAVID GERNANT**  
***Legal Counsel***

G:w

**cc : JOHN W. OSBURN, Esq.  
*Solicitor General***

**LETTER OF SUPREME COURT**

**Filed May 22, 1973**

**[Caption Omitted in Printing]**

**Mr. J. Marvin Kuhn  
Deputy Public Defender  
Labor & Industries Building  
Salem, Oregon 97310**

**In re: State v. Prince Eric Fuller**

**Dear Mr. Kuhn:**

**The Supreme Court has today denied appellant's petition  
for review in the above matter.**

**Very truly yours,**  
**/s/ J. DAVID GERNANT**  
***Legal Deputy***

**JDG:mr**

**cc: Mr. JOHN W. OSBURN  
*Solicitor General*  
State Office Building  
Salem, Oregon 97310**

SUPREME COURT OF THE UNITED STATES

No. 73-5280

PRINCE ERIC FULLER, PETITIONER

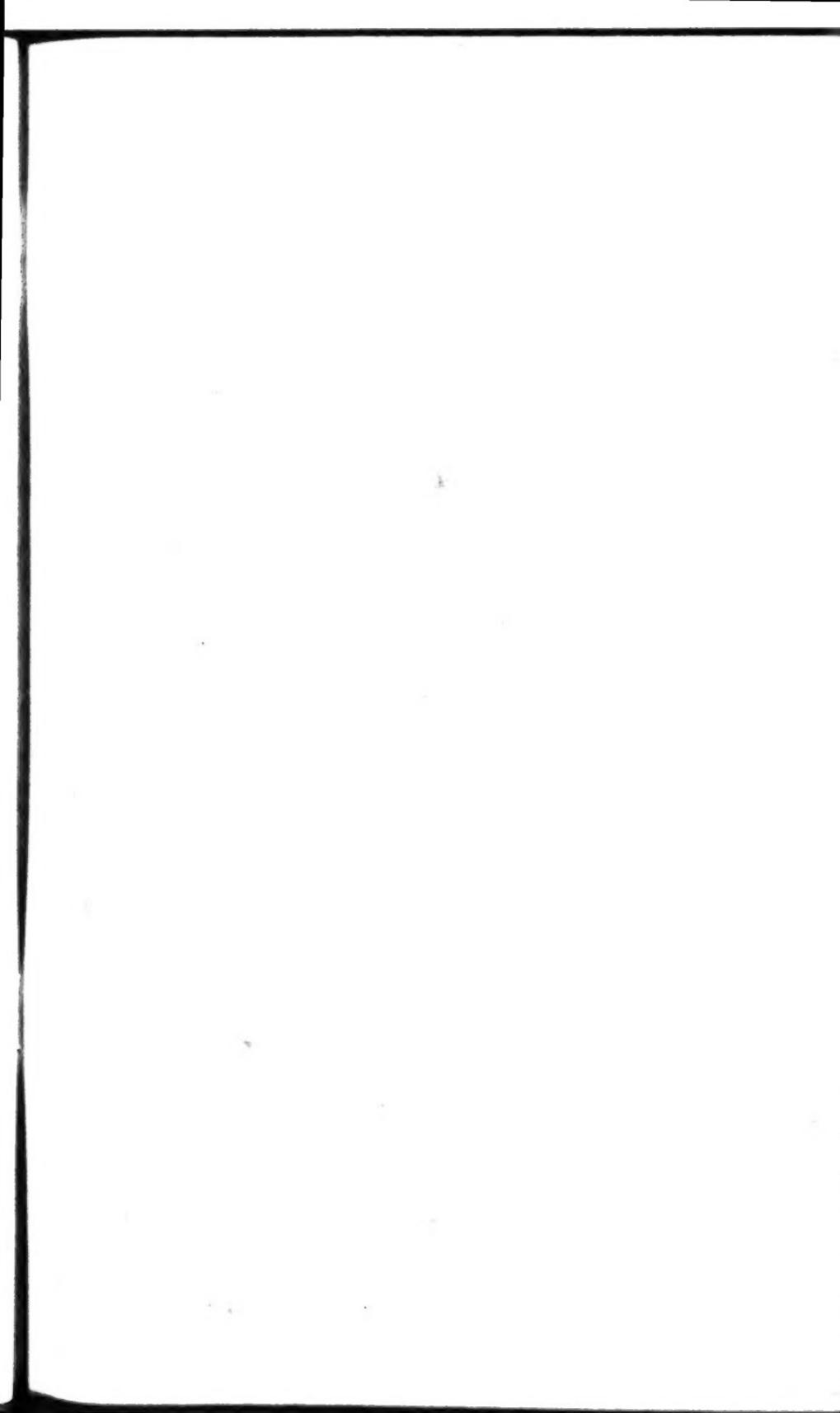
v.

OREGON

On petition for writ of Certiorari to the Court of Appeals  
of the State of Oregon.

On consideration of the motion for leave to proceed herein  
*in forma pauperis* and of the petition for writ of certiorari,  
it is ordered by this Court that the motion to proceed *in  
forma pauperis* be, and the same is hereby, granted; and  
that the petition for writ of certiorari be, and the same is  
hereby, granted.

DECEMBER 17, 1973



SUPREME COURT, U. S.

FILED

FEB 4 1974

IN THE

MICHAEL ROBAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5280

PRINCE ERIC FULLER,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF OREGON

BRIEF FOR PETITIONER

J. MARVIN KUHN  
110 Labor & Industries Building  
Salem, Oregon 97310

*Deputy Public Defender*

⑤

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1973

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No. 73-5280

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PRINCE ERIC FULLER,

*Petitioner.*

v.

STATE OF OREGON,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF OREGON

---

BRIEF FOR PETITIONER

---

OPINION BELOW

The decision of the Court of Appeals of the State of Oregon in this case is reported at 96 Or Adv Sh 457, 504 P2d 1393 (1973), and appears in the printed appendix at page 7. There was no opinion in this case in the Supreme Court of Oregon. (See A. 18).

STATEMENT OF THE GROUNDS ON WHICH THE  
JURISDICTION OF THE COURT IS INVOKED

The petitioner in this case was convicted of a felony upon a plea of guilty in the Circuit Court of the State of Oregon for the County of Multnomah. The petitioner was

subsequently placed on a term of five years' probation, one of the conditions being that he repay the cost of his court-appointed attorney's fees together with the cost of the defense attorney's investigator's fees. The contention of petitioner that these conditions of probation violated his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was rejected on the merits by the Court of Appeals of the State of Oregon (A. 7), and review was denied by the Supreme Court of Oregon (A. 18). The jurisdiction of this Court over this cause is conferred by 28 U.S.C. §1257(3).

The decision of the Supreme Court of Oregon declining to review this case was rendered on May 22, 1973. A motion for leave to proceed *in forma pauperis* and a petition for writ of certiorari were filed in this Court on August 15, 1973. Both the motion and petition were granted on December 17, 1973.

#### THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Sixth and Fourteenth Amendments to the United States Constitution and Sections 161.665; 161.675; and 161.685 of the Oregon Revised Statutes.

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtain-

ing witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statute Section 161.665 provides:

"(1) The court may require a convicted defendant to pay costs.

"(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

"(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it

appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675."

Oregon Revised Statute Section 161.675 provides:

"(1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

"(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence."

Oregon Revised Statute Section 161.685 provides:

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the

assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each \$25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

"(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

"(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

#### THE QUESTIONS PRESENTED

1. Does the requirement that an indigent criminal defendant reimburse the county for his court-appointed attorney's fees as a condition of probation violate the equal protection and due process clauses of the United States Constitution?

2. Is a requirement that an indigent criminal defendant repay to the county the cost of his court-appointed attorney's fees an impermissible restriction of the right to counsel as guaranteed by the Sixth and Fourteenth Amendments of the Constitution of the United States?

### STATEMENT OF THE CASE

On July 20, 1972, the petitioner waived his right to grand jury and entered a plea of guilty to the Multnomah County, Oregon, district attorney's information charging him with the crime of third degree sodomy (A. 2). At the time of sentencing, it was determined that petitioner had no prior criminal record except for one misdemeanor trespass conviction and that at the time petitioner was arrested he was a student at the Portland Community College (A. 3). Petitioner financed his schooling through the G.I. Bill and by selling posters and silk work done by friends of his (A. 3-4).

The Multnomah County circuit court suspended imposition of sentence and placed petitioner on a term of five years' probation including the conditions that petitioner pay to the county the cost of his court-appointed attorney's fees and \$375 for the cost of the defense attorney's investigator (A. 4-5).

The Court of Appeals of the State of Oregon rejected petitioner's claims that the above conditions of probation denied petitioner due process and equal protection of the laws and that the terms of probation did not deny to petitioner his right to counsel (A. 7).

### SUMMARY OF ARGUMENT

A requirement that an indigent criminal defendant reimburse the county for his court-appointed attorney's

fees as a condition of probation violates the equal protection and due process clauses of the United States Constitution because it constitutes an invidious discrimination between the indigent and the well-to-do defendant.

Section 161.675(2) of the Oregon Revised Statutes applies to convicted indigents only and does not apply to those indigent defendants whose cases were dismissed or who were acquitted after trial by jury. Further, the statute has been applied only to require those placed on probation to repay the county for the costs of their court-appointed attorney and has not been applied to those convicted indigents who were sentenced to terms of imprisonment.

The Oregon statutes fail to provide petitioner with the statutory exemptions provided other Oregon debtors and also fail to provide petitioner with adequate notice of his possible liability as well as failing to provide a means whereby the petitioner may contest the unreasonableness of the fees charged.

A requirement that an indigent criminal defendant repay to the county the cost of his court-appointed attorney's fees is an impermissible burden upon the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution in that it tends to inhibit a defendant from exercising this constitutional right.

## ARGUMENT

### I.

#### A REQUIREMENT THAT AN INDIGENT CRIMINAL DEFENDANT REIMBURSE THE COUNTY FOR HIS COURT-APPOINTED ATTORNEY'S FEES AS A CONDITION OF PROBATION VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Subsequent to petitioner entering the plea of guilty to the charge of sodomy in the third degree, the Multnomah County Circuit Court placed the petitioner on probation for a period of five years, imposing as a condition of that probation the requirement that petitioner pay the cost of his court-appointed attorney's fees as well as a total of \$375 for the cost of the defense attorney's investigator (A. 4-5). Petitioner believes that such a condition is unreasonable because it is grossly unfair for the state to try and convict an indigent defendant after appointing him counsel and then requiring him to pay the cost of that counsel. Petitioner submits that this denies him equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

As pointed out in the dissenting opinion of Judge Fort, the condition of probation imposed in the instant case constitutes an "invidious discrimination between the indigent and the well-to-do defendant."

In *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed2d 600 (1972), this Court concluded that a Kansas statute relating to recoupment from an indigent defendant was unconstitutional because that statute denied defendant equal protection in that it did not allow him certain exemptions from execution provided for other

debtors. As so aptly pointed out by Judge Fort in his dissenting opinion, nothing in ORS 161.675(2) affords the petitioner in a revocation proceeding the exemptions provided other debtors generally under Oregon law. Since the Oregon statute (ORS 161.675(2)) fails to provide petitioner with the statutory exemptions provided other Oregon debtors, the Oregon statute can stand on no firmer ground than that statute declared unconstitutional by this Court in *James v. Strange*, supra, and so denies petitioner equal protection of the laws.

The Oregon Court of Appeals, in its majority opinion, decided that the court-appointed attorney's fees and investigatory expenses were "costs" as defined by ORS 161.665(2), and so were appropriately assessed against petitioner and that their repayment could properly be made a condition of probation pursuant to ORS 161.675(2) (A. 10-11). The court then distinguished the Oregon statute from the Kansas statute condemned in *James v. Strange*, supra, by stating that, "... No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes" (A. 12). However, as Judge Fort perceived in his dissenting opinion, the Oregon statutes allowing recoupment of costs do not afford the petitioner in a revocation proceeding the exemptions provided debtors generally under Oregon law.<sup>1</sup> This failure to provide petitioner

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<sup>1</sup> ORS 137.550 provides:

- (1) Subject to the limitation in ORS 137.010:
  - (a) The period of probation shall be such as the court determines and may, in the discretion of the court, be continued or extended.
  - (b) The court may at any time discharge a person from probation.

with such exemptions denies him equal protection of the laws.

The Oregon Court of Appeals further reasoned that the reimbursement of a criminal defendant's court-appointed attorney's fees as a condition of probation did not deny to the indigent defendant due process or equal protection of the laws because a revocation may only occur when the court finds that the defendant has the ability to repay

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(2) At any time during the probation period, the court may issue a warrant and cause a defendant to be arrested for violating any of the conditions of probation. Any probation officer, police officer or other officer with power of arrest may arrest a probationer without a warrant, and a statement by the probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation is sufficient warrant for the detention of the probationer in the county jail, house of detention or local prison, when designated in such statement, until the probationer can be brought before the court. The probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing in what manner the probationer has violated his probation. Thereupon the court, after summary hearing, may revoke the probation and suspension of sentence and cause the sentence imposed to be executed or, if no sentence has been imposed, impose any sentence which originally could have been imposed. A defendant who has been previously confined in the county jail as a condition of probation pursuant to ORS 137.540 shall be given credit for all time thus served in any order or judgment of confinement resulting from revocation of his probation. In the case of any defendant whose sentence has been suspended but who is not on probation, the court may issue a warrant and cause the defendant to be arrested and brought before the court at any time within the maximum period for which the defendant might originally have been sentenced. Thereupon the court, after summary hearing, may revoke the suspension of sentence and cause the sentence imposed to be executed.

the costs and his failure to repay was an "intentional contumacious default". This, defendant submits, does not resolve the problem but only begs the question since the statute itself, in petitioner's opinion, is a denial of equal protection and no amount of legal legerdemain by the court can save it.

Petitioner submits that ORS 161.665 is patently unconstitutional since its language expressly applies only to those indigent defendants who have been convicted of crime, and does not apply to those indigent defendants who, although they may have been represented by court-appointed counsel, were fortunate enough to have their cases dismissed or who were acquitted after trial by jury. Petitioner also submits that as a practical matter very few Oregon penitentiary inmates have been required to reimburse the county for the cost of their court-appointed attorney if they have been sentenced to either the Oregon State Penitentiary or the Oregon State Correctional Institution.

In *Rinaldi v. Yeager*, 384 US 305, 86 S Ct 1497, 16 L Ed2d 577 (1966), this Court held unconstitutional a New Jersey statute that authorized the county treasurers to recover the costs incurred in preparing a trial transcript for an indigent defendant for the purposes of appellate review. It was noted that the New Jersey statute did not impose the same financial burden upon all convicted defendants, but applied only to those incarcerated in state institutions. This Court held the New Jersey statute violated the equal protection clause, indicating that the Fourteenth Amendment requires more of a state law than nondiscriminatory application within the class established. This Court indicated that the equal protection clause also required some rationality in the nature of the class singled out saying:

"\* \* \* To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination. \* \* \*

Petitioner submits that this same discrimination is inherent in the Oregon statute since it applies only to convicted defendants and, therefore, denies to the convicted indigent defendant the equal protection of the law.

As did the statute condemned in *Rinaldi v. Yeager*, *supra*, the Oregon statute serves no defensible interest by focusing only on the convicted defendant if the true purpose of the statute is to provide reimbursement to the county. If the Oregon statute was truly for the purpose of reimbursement, in order to satisfy the requirements of the equal protection clause, it would have to apply to all criminal defendants, whether or not they were convicted. The only requirement should be that the county did provide a court-appointed attorney to the criminal defendant, and the repayment of costs should not depend solely on whether or not the indigent was unsuccessful in his defense.

A thorough review of the record in the instant case indicates that the state has failed to produce any compelling governmental interest or the need to recover the expenses of providing a defense for indigent defendants or, if such a need exists, that collections should be made by the judiciary through the use of probationary conditions. As the California Supreme Court noted in *Ingram v. Justice Court for Lake Valley Judicial District*, 73 Cal Rptr 410, 416 (1968):

"... [T]he fundamental flaw in the People's position is its unstated assumption that the courts are the guardians of the county coffers. In our system of government this is not, and should not be, their role. The Constitution and the statutes commit that

responsibility, more appropriately, to the board of supervisors, assisted by such officers as the district attorney, the county counsel, the treasurer, the controller and auditor and the inquisitorial body of citizens, the grand jury."

Even if the state had shown that its fiscal situation required a compelling reason for recoupment, petitioner submits that making an indigent repay his court-appointed attorney's fees and investigation expenses as a condition of probation is not a proper method to insure reimbursement.

Petitioner believes that reimbursement to the county of his court-appointed attorney fees and investigator fees denies him due process of law because such conditions have no relationship to the crime for which he was convicted; have no relation to conduct not itself criminal; and requires conduct not reasonably related to future criminality. *In re Bushman*, 1 Cal3d 767, 83 Cal Rptr 375, 463 P2d 727 (1970); *State v. Baynard*, 4 N.C. App 465, 167 SE2d 514 (1969).

The Oregon court attempted to justify the recoupment of attorney fees through the medium of probation by comparing them to restitution to the victim of the crime as allowed by ORS 137.540,<sup>2</sup> and that such repayment

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<sup>2</sup>ORS 137.540 provides:

The court shall determine, and may at any time modify, the conditions of probation, which may include, as well as any others, that the probationer shall:

- (1) Avoid injurious or vicious habits.
- (2) Avoid places or persons of disreputable or harmful character.
- (3) Report to the probation officer as directed by the court or probation officer.

could very well be considered rehabilitative (A. 12). The court then reasoned that a defendant should not have the right to refuse to make payment of the costs or to make restitution imposed against him as a result of his own misconduct. Petitioner believes the fatal fallacy in the court's reasoning is readily apparent. One, the reimbursement of the cost of his court-appointed attorney's fees needlessly impinges upon the defendant's constitutional right to counsel and impinges on the free exercise of this right (see Argument II, infra); and two, when a defendant is forced to make restitution to the victim of his crime, no constitutional right of his is violated. Further, a defendant who is ordered to make restitution has knowledge of the amount involved while an indigent who must reimburse the county for the cost of his defense not only has no idea of what the cost may be, but is given no opportunity to contest the amount of the assessments made in terms of the value of the services received. When

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(4) Permit the probation officer to visit him at his place of abode or elsewhere.

(5) Answer all reasonable inquiries of the probation officer.

(6) Work faithfully at suitable employment.

(7) Remain within a specified area.

(8) Pay his fine, if any, in one or several sums.

(9) Be confined to the county jail for a period not to exceed one year or one-half of the maximum period of confinement that could be imposed for the offense for which the defendant is convicted, whichever is the lesser.

(10) Make reparation or restitution to the aggrieved party for the damage or loss caused by offense, in an amount to be determined by the court.

(11) Support his dependents.

(12) Remain under the supervision and control of the Corrections Division.

repayment is made a condition of probation, the indigent may even be deprived of his liberty without ever having had a hearing on the reasonableness of the attorney fees or investigatory costs imposed against him. This procedure, or lack of it, in petitioner's opinion, denies him due process of law as guaranteed by the Fourteenth Amendment.

Petitioner also believes that ORS 161.665 is unconstitutional because it fails to provide that a defendant who may be liable under the statute receive notice of the liability or a hearing. *People v. Amor*, 110 Cal Rptr 701, 35 Cal App 3rd 344 (1973). In *People v. Amor*, the California court held that §987.8 of the California Penal Code<sup>3</sup> denied defendant due process of law because the statute failed to provide notice to the defendant of the liability or a hearing. The court said:

"... Since a judgment has special ramifications for a defendant and can become a lien against real estate, due process requires that a defendant be notified that his liability is to be in the form of a judgment. . . ."

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<sup>3</sup> §987.8 of the California Penal Code provides:

In any case in which a defendant is furnished counsel, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, the court shall make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. If the court determines that the defendant has the present ability to pay all or part of the cost, it shall order him to pay the sum to the county in any installments and manner which it believes reasonable and compatible with his financial ability. Execution may be issued on the order in the same manner as on a judgment in a civil action. The order shall not be enforced by contempt.

In Oregon, a judgment that a criminal defendant pay costs is docketed as a judgment in a civil action and has the same effect. ORS 137.180.<sup>4</sup> Such judgment then becomes a lien upon all defendant's real property then owned by him or which he may subsequently acquire. ORS 18.350(1). Since a criminal defendant is thus subject to possible loss of property, petitioner believes due process requires adequate notice to him of this very real possibility as well as the right to a hearing to determine the reasonableness of the costs. This ORS 161.665 fails to do, and it thus denies petitioner due process of law. *People v. Amor*, *supra*.

## II.

### A REQUIREMENT THAT AN INDIGENT CRIMINAL DEFENDANT REPAY TO THE COUNTY THE COST OF HIS COURT-APPOINTED ATTORNEY'S FEES AS A CONDITION OF PROBATION IS AN IMPERMISSIBLE RESTRICTION OF THE RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Petitioner submits that a condition of probation requiring him to reimburse the county for the cost of his court-appointed attorney's fees is an impermissible burden upon the right to counsel established in *Gideon v. Wainright*, 372 US 335, 83 S Ct 792, 9 L Ed2d 799, 93

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<sup>4</sup>ORS 137.180 provides:

"A judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect, as provided in ORS 18.320, 18.350 and 18.400."

ALR2d 733 (1963), and recently reinforced by this Court in *Argersinger v. Hamlin*, 407 US 25, 92 S Ct 2006, 32 L Ed2d 530 (1972).

This same issue was considered by the Supreme Court of California in the case of *In re Allen*, 71 Cal2d 388, 78 Cal Rptr 207, 455 P2d 143 (1969). After a discussion of the United States Supreme Court decisions, the California court said:

"We conclude that the imposition of the condition under attack constitutes an impediment to the free exercise of a right guaranteed by the Sixth Amendment to the Constitution and as with respect to other impediments or forms of compulsion against the exercise of such rights may not be permitted by the courts."

The court further reasoned that:

"It would appear utterly inconsistent to advise a defendant of his entitlement to the free service of counsel and later to exact repayment through the medium of a condition of probation. *Miranda*<sup>5</sup> (P. 491 [16 L Ed2d P. 733]) made clear that where 'rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them.' "

The California court in *In re Allen* also stated:

"We may take judicial notice that judges in San Mateo County and in certain other counties have made use of the method utilized in the case at hand of reimbursing this county's treasury for funds expended in supplying counsel for indigents.

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<sup>5</sup> *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed2d 694 (1964).

Although this concern for the financial burdens imposed upon the counties for such costs is commendable, we believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the Court in *Gideon, supra*. Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact, she requested and received counsel, neither does the record show that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation."

Again, in *People v. Johnson*, 104 Cal Rptr 75 (1972), the California Court of Appeal for the Fourth District held such a condition of probation as invalid under the Sixth Amendment to the United States Constitution, saying:

"Moreover, the imposition of reimbursement for the costs of court-appointed counsel as a condition of probation is constitutionally proscribed as an impediment to the free exercise of a Sixth Amendment right. \* \* \*"

The Oregon Court of Appeals refused to follow the rule of *In re Allen*, *supra*, because an indigent in Oregon

is given counsel immediately, and so, the court believed, he is not denied counsel even if he is later required to reimburse the county for the cost of counsel (A. 11-12). Petitioner believes the Oregon court utterly failed to grasp the reasoning of *In re Allen*, supra. The rationale is not only that an indigent will be burdened by the requirement to repay attorney fees, but that the indigent will waive his fundamental right to counsel rather than incur the debt at all. (This is assuming, of course, that the indigent is advised of his possible liability to repay the fees of his court-appointed attorney.) This very real possibility was recognized by the A.B.A. *Project on Providing Defense Services*<sup>6</sup> when it said at page 59:

"Apart from these constitutional objections, the practice of requiring payment from funds not available at the time of determination of eligibility may serve to discourage the acceptance of counsel by those who are most in need and least able to appreciate the practical consequences of the imposition of such an obligation of reimbursement."

Since the punishment in misdemeanor cases is usually a fine, the counsel fee could very well be higher than the fine imposed by the court on conviction. But the real damage occurs when an indigent defendant chooses to waive counsel and suffers prejudice as a result.

Although this Court in *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed2d 600 (1972), did not reach the question presented by the instant petitioner, this Court has held that an individual shall not be penalized for asserting a constitutional right.

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<sup>6</sup> A.B.A. Project on Providing Defense Services (Approved Draft 1968).

In *United States v. Jackson*, 390 US 570, 88 S Ct 1209, 20 L Ed2d 138 (1968), this Court held the death penalty provisions of the Federal Kidnapping Act imposed an impermissible burden upon the exercise of the defendant's Fifth Amendment privilege not to plead guilty as well as deterring his exercise of his Sixth Amendment right to demand a trial by jury. The Court, in holding that portion of the statute unconstitutional, said:

"\* \* \* If the provision had no other purpose or affect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. \* \* \*"

This Court held that, even though procedures are not inherently coercive, they still may be such as to impose an impermissible burden upon the assertion of a constitutional right.

This Court, in *Gardner v. Broderick*, 392 US 273, 88 S Ct 1913, 20 L Ed2d 1082 (1968), and *Sanitation Men Asso. v. Commissioner*, 392 US 280, 88 S Ct 1917, 20 L Ed2d 1089 (1968), held that a policeman in *Broderick* and the sanitation men in the latter case could not be dismissed from their positions for asserting their Fifth Amendment privilege to remain silent.

The Fifth Amendment right against self-incrimination was also protected by this Court in *Griffin v. California*, 380 US 609, 86 S Ct 1229, 14 L Ed2d 106 (1965), where the Court held that a criminal defendant could not be penalized for asserting his privilege against self-incrimination. See also *Spevack v. Klein*, 385 US 511, 87 S Ct 625, 17 L Ed2d 574 (1967).

As defined by this Court in *Malloy v. Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed2d 653 (1964), "penalty" is any sanction that makes assertion of the privilege "costly".

Petitioner can think of nothing more costly than an indigent waiving his right to counsel in order to avoid having repayment of his appointed counsel's fees hanging over his head like a Sword of Damocles for a number of years.

Petitioner, therefore, believes the requirement that an indigent reimburse the county for the cost of his attorney's fees as a condition of probation is an impermissible restriction upon the free exercise of his right to counsel and would inhibit a defendant from exercising this constitutional right. In order to be fully consistent with the Oregon Court of Appeals' opinion in the instant case, petitioner believes that in the future, any time a criminal indigent defendant is advised of his right to court-appointed counsel, in order to ensure a full and adequate understanding of this right, the defendant must also be advised that, should he be convicted of the crime with which he is charged, he might well have to reimburse the county for the costs of his court-appointed attorney's fees. See *Carnley v. Cochran*, 369 US 506, 82 S Ct 884, 8 L Ed2d 70 (1962). This, then, in petitioner's opinion, could well have a "chilling" effect on the indigent exercising his right to counsel as guaranteed by *Gideon v. Wainwright*, supra.

This possible "chilling" effect was also noted by the A.B.A. Project, supra, when it recommended against reimbursement in its section on eligibility for defense counsel:

#### "6.4 Reimbursement

*"Reimbursement of counsel or the organization or government unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility. (emphasis in original) A.B.A. Project, Approved Draft, (1968), supra, P. 58."*

As explanation for its recommendation, the Project report stated at pp. 58, 59:

"A number of jurisdictions impose an obligation upon the accused to pay a fee for services rendered, *when and if he is able*. This obligation is often enforced as a condition of probation. The practice raises serious constitutional questions: Whether due process is denied if the accused is compelled to pay after having been acquitted or if he is not informed of his obligation at the time counsel is provided; whether a waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation; whether conditioning probation on such payment amounts to imprisonment for debt. See *DEFENSE OF THE POOR* 113-115; Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 Minn. L. Rev. 1, 26 (1963).

"Apart from these constitutional objections, the practice of requiring payment from funds not available at the time of determination of eligibility may serve to discourage the acceptance of counsel by those who are most in need and least able to appreciate the practical consequences of the imposition of such an obligation of reimbursement. Moreover, the amounts which can be collected under such a requirement are negligible, especially if the cost of collection is taken into account." (emphasis added)

In asserting his position, petitioner is aware of the dicta in *Rinaldi v. Yeager*, 384 US 305, 86 S Ct 1497, 16 L Ed2d 577 (1966), to the effect that repayment of costs may be an appropriate condition of probation or parole. Petitioner believes, however, that this dicta should not be persuasive because, as pointed out in *Comment, Reim-*

*busement of Defense Costs as a Condition of Probation for Indigents*, 67 Mich. L. Rev. 1404, 1412 (1969):

"[The Supreme Court] cited as support a detailed study which indicated that some judges in our jurisdiction require, as a condition of probation, that the convicted indigent repay the county's expenditure for his lawyer. The persuasiveness of the Court's statement, however, is undercut not only by the lack of analysis, but also by the fact that the study cited in support of that contention expressed grave doubts both as to the constitutionality and as to the wisdom of requiring reimbursement as a condition of probation. Moreover, even if the dicta in *Rinaldi* could be interpreted as approval of such a condition, the fact that the constitutional validity of the condition was not at issue suggests that the question is still open."

By not adhering to the ruling and rationale of *In re Allen*, supra, the Oregon court has placed petitioner in a position where he cannot win. He is damned if he does choose to have counsel appointed for him because, upon receiving probation, he must either make a good faith effort to repay the cost of his defense or face continued imprisonment, and he is damned if he chooses not to have counsel appointed because he does not receive "the guiding hand of counsel" before and during trial.

Petitioner, therefore, believes that a condition of probation imposing upon him the requirement to reimburse the county in the amount of his court-appointed attorney's fees needlessly penalizes the assertion of a constitutional right and is, therefore, unconstitutional. See *Griffin v. California*, supra.

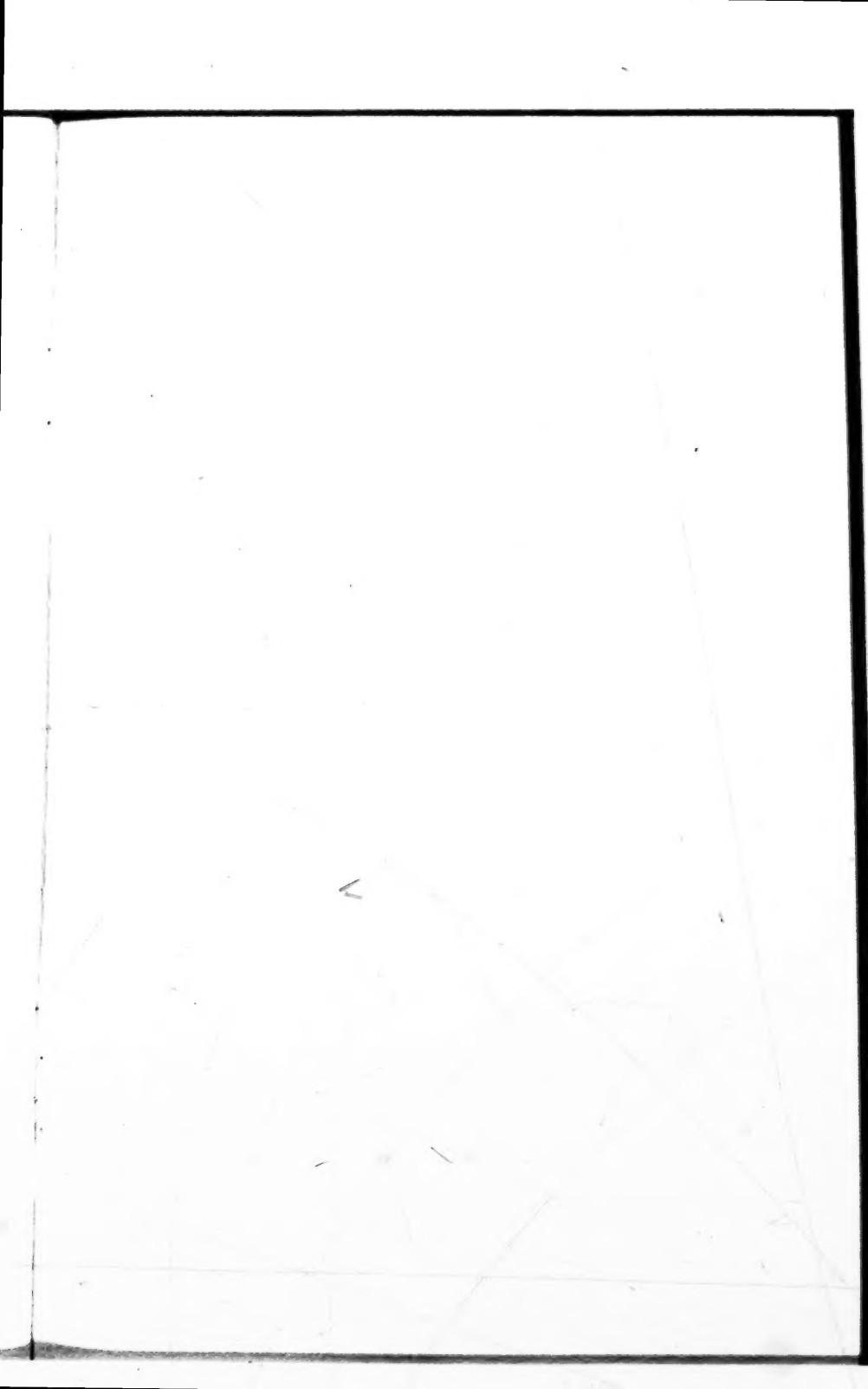
## CONCLUSION

For the reasons stated, it is respectfully submitted the judgment of the court below should be reversed.

Respectfully submitted,

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*Deputy Public Defender*



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Supreme Court U.S.  
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MAR 26 1972

MICHAEL NOBIAK, JR.

IN THE

**Supreme Court of the United States**  
**OCTOBER TERM, 1972**

**No. 73-5280**

**PRINCE ERIC FULLER,**

*Appellant,*

v.

**STATE OF OREGON,**

*Appellee.*

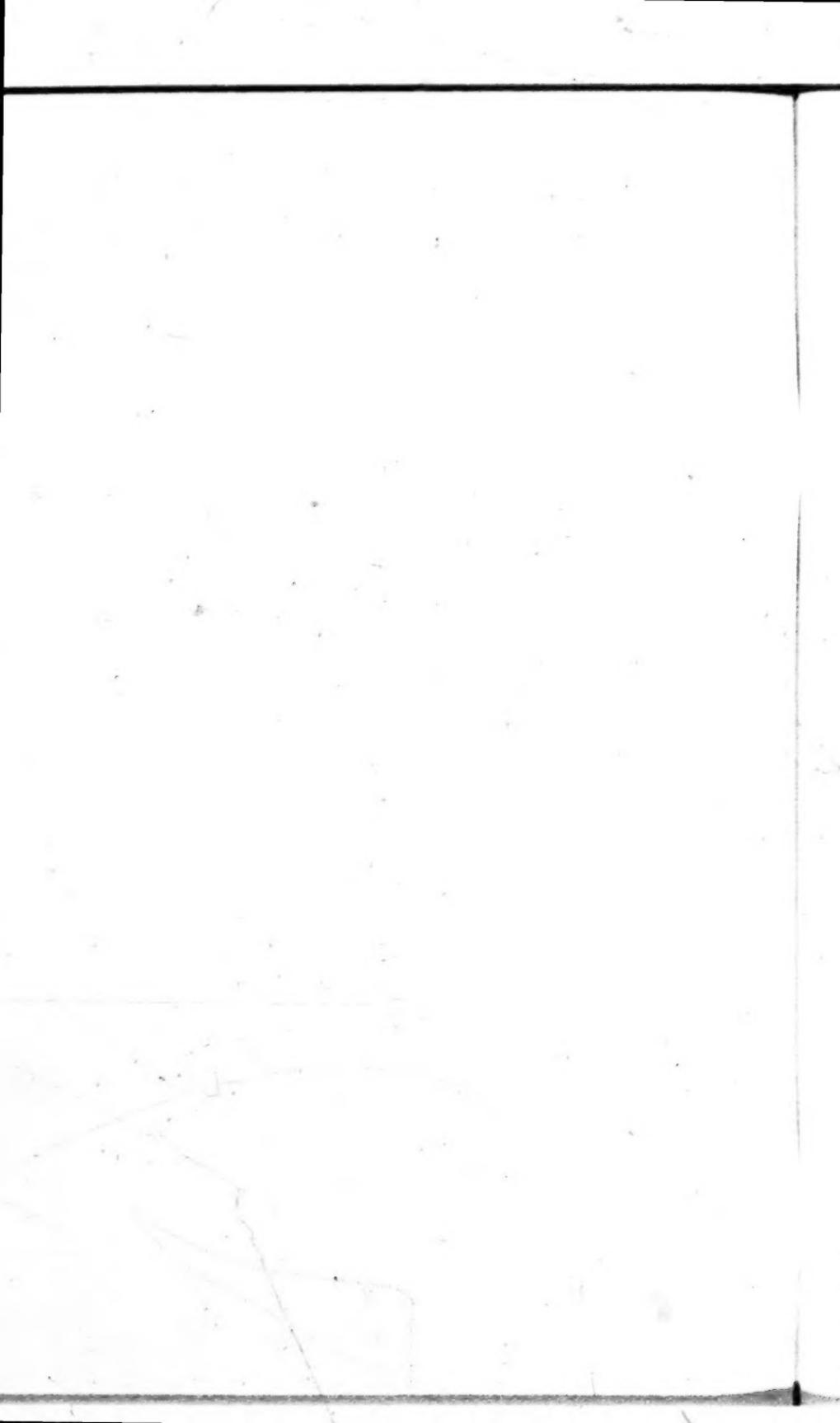
**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF OREGON**

**BRIEF OF THE  
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION  
AS AMICUS CURIAE**

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(i)

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
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---

**BRIEF OF THE  
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION  
AS AMICUS CURIAE**

---

**INTEREST OF AMICUS CURIAE**

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal aid and defender offices in the United States. Founded in 1911, it includes over 3,500 individual and professional members, including appointed counsel, members of the retained bar, and community leaders from all walks of life. Its main concern is extending and guaranteeing legal services to the poor.

NLADA is opposed to the statutory scheme in the State of Oregon and believes that it creates an intolerable burden on the exercise of the Sixth Amendment right to counsel in that it puts a price tag on justice. For that reason it seeks to file this brief on behalf of the appellant in the instant case.

NLADA files this Brief Amicus Curiae pursuant to Supreme Court Rule 42(2). The written consent of counsel for all parties is attached hereto.

#### **OPINION BELOW**

The decision of the Court of Appeals of the State of Oregon in this case is reported at 96 OR Adv Sh 457, 504 P2d 1393 (1973).

#### **STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED**

A petition for writ of certiorari was filed in this Court on August 15, 1973, and was granted on December 17, 1973.

#### **QUESTION INVOLVED**

Whether charging costs of appointed counsel for indigents as a condition of probation violates the accused's right to counsel, to a jury trial, to due process and equal protection of law.

#### **STATUTORY PROVISIONS INVOLVED**

This case involved the Sixth and Fourteenth Amendments to the United States Constitution. The Oregon statutes involved are ORS 161.665 and ORS 161.675.

## STATEMENT OF THE CASE

Amicus adopts appellant's statement of the case.

## ARGUMENT

### I. THE OREGON PRACTICE OF CHARGING ATTORNEYS' FEES AS A CONDITION OF PROBATION IS CONTRARY TO THE RIGHT TO COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

#### A. ORS 161.665 and ORS 161.675 Constitute an Impediment To the Right To Counsel

Financial penalties are imposed against law violators as a method of deterring future criminal conduct. This is a generally accepted practice. The Oregon practice has the effect of placing a financial penalty upon those defendants who seek legal assistance, but cannot afford to retain counsel.

Knowledge that an accused may be charged for appointed counsel tends to discourage indigents seeking representation. A condition of probation that requires the defendant to reimburse the government for court-appointed counsel acts as a deterrent to persons seeking counsel. Such a situation arose in *In Re Allen*, 71 Cal 2d 388:

"... We believe that as knowledge of this practice has grown and continued to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant

of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the court in *Gideon, supra*." (Allen, *supra*, p. 391)

"The fact that such knowledge might deter her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation. The government is without constitutional authorization to impose a predetermined condition on the exercise of a constitutional right or penalize in some manner its use." (Allen, *supra*, p. 391).

"We conclude that the imposition of the condition under attack constitutes an impediment to the free exercise of a right guaranteed by the Sixth Amendment to the Constitution and as with respect to other impediments or forms of compulsion against the exercise of such rights may not be permitted by the courts." (Allen, *supra*, p. 392)

"It would appear utterly inconsistent to advise a defendant of his entitlement of the free services of counsel and later exact repayment through the medium of a condition of probation. *Miranda* made clear that where 'rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.' " (Allen, *supra*, p. 393)

The American Bar Association Project on Minimum Standards for Criminal Justice discussed the same situation in its Standards Relating to "Providing Defense Services at page 58:

"Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility."

The commentary following 6.4 also agreed that reimbursement discourages the acceptance of counsel. The commentary not only called attention to the lack of wisdom of such practice. It pointed out, "The practice raises serious constitutional questions: Whether due process is denied if the accused is compelled to pay after having been acquitted or if he is not informed of his obligation at the time that counsel is provided, whether a waiver of counsel is valid if it is made because of the accused's unwillingness to undertake such an obligation, whether conditioning probation on such payments amounts to imprisonment for debt." (Citation) p. 58, 59. The commentary also called attention to the lack of value of such a practice as a fund raising device. As was also documented in *James v. Strange*, 407 US 128 (1972), and is generally conceded, such practices are not meaningful revenue producers. There appears, therefore, to be no compelling state interest in maintaining the practice.

The intention of Oregon is not the overriding factor:

"The question is not whether the chilling effect is unintentional rather than intentional, the question is whether the effect is unnecessary and therefore excessive." *U.S. v. Jackson*, 390 U.S. 570, 582 (1968).

It does, however, appear that Oregon's intention is to seek sanctions against those indigents who might request counsel. The statutes blatantly used the phrase *sentenced to pay costs*.

"*Sentence.* The judgment formally pronounced by the Court or judge upon the defendant after his conviction in a criminal prosecution awarding the punishment to be inflicted. Judgment formally declaring to the accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to the meaning . . ." *Black's Law Dictionary*, Fourth Edition, 1951 p. 1528.

In this case, the Oregon Appellate Court stated at page 7:

"We see no good reason why a defendant should have the right to refuse to . . . pay costs against him as a result of his own wrongdoing if in the future it is determined that his circumstances have changed so that he is able to pay."

It is interesting that the Court seems to consider as a cost of wrongdoing, not just the alleged criminal conduct, but the exercise of a constitutional right to receive fair treatment in the Oregon Courts. Further, the Court fails to recognize "that representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." *Argersinger v. Hamlin*, concurring opinion, Chief Justice Burger, 407 U.S. 25, 44.

One should be careful not to confuse what is occurring in criminal cases in Oregon with the awarding of costs in civil cases. The nature of criminal cases with the presumption of innocence, right to remain silent, right against self-incrimination and proof beyond a reasonable doubt standard clearly differentiates them from civil cases. In civil matters, communications and negotiations between the par-

ties usually take place before seeking legal remedies, and therefore most civil disputes are handled and settled without ever involving any part of the judicial process. On the other hand, criminal matters invariably automatically involves the judicial process. The issuance of a mere traffic ticket constitutes the filing of a criminal charge. Whether the title of the government's pleading be complaint, information, or indictment, the action almost automatically begins by involving the judicial process. Since the person charged, in reality, has little or no opportunity to avoid the judicial process, he should not be punished for being forced into it.

Further, if the State of Oregon considers this legislation to be merely awarding costs to the prevailing party, the state somehow forgot to make any provisions for making an award to those who are unwillingly forced to appear and defend themselves against criminal charges, and are not convicted.

#### B. ORS 161.665 and 161.675 Acts as a Deterrent To Effective Representation by Counsel

The right to counsel, *Gideon v. Wainwright*, 372 U.S. 355; 83 S.Ct. 792 (1963) includes the right to effective assistance of counsel, *Powell v. Alabama*, 287 U.S. 55 (1932). Effective counsel includes the use of investigators and other experts helpful in the preparation of the case. *Cornell v. Sup. Ct.*, 52 C2d 99 (1959); *Clifton v. Sup. Ct.*, 7 CA 3d 245 (1970) American Bar Association standards relating to "Providing Defense Services" § 1.5, American Bar Association standards relating to "The Defense Function" § 4.1.

For an attorney to effectively represent his client often he must use the services of an investigator or other expert, prepare various motions to protect his clients' in-

terest and possibly challenge whether the police or other representatives of the government acted within constitutional guidelines. Under ORS 161.665 and 161.675 the client would know that using investigators to find witnesses and the making of various motions may increase his costs should he be convicted. This could tend to deter accused individuals from giving information to their attorney that might require additional investigation or preparation by the attorney.

As anyone experienced in criminal trials is aware and as expressed in the commentary of the two ABA standards just cited, investigation is essential to proper representation. Proper preparation by the defense attorney through use of investigators and other experts is, of course, useful to the administration of justice in that only when the attorney is thoroughly informed can he properly advise his client as to a recommended course of conduct.

Investigators and experts are helpful not only to determine the guilt or innocence of the accused, but also to determine whether or not the accused may be guilty of a lesser crime.

After a firm determination as to the guilt of the accused, a need for an investigator or expert (such as a psychiatrist) may still exist. The role of an attorney does not cease upon a determination of guilt. The attorney has the responsibility of presenting his clients' case at the time of sentencing. Counsel may desire to show mitigating or extenuating circumstances with regard to the criminal acts; or perhaps present a psychiatric evaluation or recommendation to the court, so that the court may have at its disposal greater understanding of the defendant and various alternative methods of dealing with him. The Oregon practice places the attorney in the uncomfortable position of attempting to seek information that may result

in reducing the sentence, and at the same time, automatically increasing the sentence by increasing the costs to be imposed. A seemingly improper situation is created when proper representation is in itself counter-productive and harmful to the client.

Proper representation by counsel is not only beneficial to the client, but to society as well. It is in society's interest not only to convict the guilty, but to have the innocent acquitted, to make certain the conviction is of only the proper offense, and that any sentence imposed properly fits the circumstances surrounding the crime and the individual defendant.

## II. ORS 161.665 AND ORS 161.675 IS CONTRARY TO THE RIGHT OF TRIAL BY JURY

ORS 161.665(2) does not permit costs to include "expenses inherent in providing a constitutionally guaranteed jury trial." However, the Oregon Court of Appeals decision in this case at page 3 interprets those costs as "a jury fee and the costs of summoning jurors."

Since the court interprets the costs of an attorney as a cost that can be charged, it is apparent that despite the exclusion of jury fees this legislation still has a chilling effect upon the right to trial by jury.

Should the accused desire to exercise the right to a jury trial on the issue of the criminal charge, he is likely to be charged a greater fee in that jury trials involve more of counsel's time than do court trials or pleas of guilty. Attorney's fees are customarily determined by the time expended in a given case.

There can be no condition placed upon the exercise of a constitutional right.

"It is a penalty imposed by courts for the exercise of a constitutional privilege. It cuts down on the privilege by making its assertion costly." (*Griffin v. State of California*, (1965) 380 U.S. 609, 614, 85 S.Ct. 1229, 1233).

It would be difficult to deny that a financial penalty would not have a chilling effect upon the accused seeking a trial by jury. An attorney would be negligent in his duties if he did not advise his client of the additional expense involved in a jury trial. Individuals faced with a decision whether or not to seek a trial by jury may therefore be discouraged from exercising their constitutional privilege of a jury trial.

In addition, charging for the exercise of the right to trial by jury is equivalent to increasing the punishment for requesting a trial by jury. Such a penalty is improper.

". . . we think it is clear that by increasing the penalty in the case of a defendant who chooses to rely on the presumption of innocence, to put the state to the test of proving its case, and to assert his right to a jury trial, one is in effect penalizing a defendant who asserts rights to which he is entitled." (*People v. Morales*, (1967) 252 CA 2d 537, 546.)

It appears that Oregon has recognized the problem of placing a burden upon a *constitutionally guaranteed jury trial*, but not of placing a burden upon the *constitutionally guaranteed right to counsel*, which right is necessary to give meaning to the *constitutionally guaranteed jury trial*.

### III. THE OREGON STATUTORY SCHEME DENIES DUE PROCESS

The Oregon practice involves the taking of property (money) by the state. Therefore the requirements of due process must be met. The minimum requirements of due process are mentioned in *Goldberg v. Kelly*, 397 U.S. 54 (1970), a case involving pretermination hearings for welfare cases. Listing what was called "rudimentary due process" includes:

1. Timely & adequate notice;
2. The right to appear personally before the officer who will make the decision;
3. The right to present evidence;
4. The right to confront and cross-examine witnesses;
5. The recipient must be permitted to retain an attorney;
6. The decision must revolve upon the legal rules & the evidence adduced at the hearing;
7. The decision maker must be an impartial officer;
8. The decision maker must state the reasons for his determination;
9. The decision maker must indicate the evidence relied upon.

Timely and adequate notice would seem to require that upon the initial appearance in court, and prior to the appointment of counsel the accused must be advised he may be required to pay many of the costs involved in his prosecution. Before the assessment of any costs, the defendant should be advised what is the intended assessment

and what evidence will be relied upon to determine those costs. The Oregon scheme fails on both accounts. In addition the statute must be specific enough to properly place the defendant on notice as to how and whether an assessment will be made. The statute is much too vague as to any standards, leaving the assessment and the amount of assessment to the *uncontrolled* discretion of the judge.

The right to appear personally before the officer who will make the decision does not appear to be required by the statute. The costs under this statute could be assessed at a later date.

The right to confront and cross-examine witnesses is not a part of the statute.

The right to retain an attorney is not a part of the statute. While the defendant has an attorney representing him in the criminal matter, one would think that the attorney would be required to reduce any sanctions taken against his client to the greatest degree he is able; however, when the attorney is required to set a value on his own services and the services of an investigator whom he hires, there is such a clear conflict of interest that it is impossible to say that the attorney is in reality representing his client during any hearing under this statute. For example, if the defendant wanted to challenge the billing of the investigator whom the attorney hired, it would be difficult for the attorney, without having a conflict of interest, to claim that he hired an investigator who would file a fraudulent claim. Or the defendant may desire to challenge what the attorney states is proper compensation, or the number of hours expended. If the attorney is not paid, is he to call this to the attention of the court and ask it to hold his own client in violation of probation? In effect the defendant is un-

represented, and the attorney-client relationship can be seriously strained.

There is no requirement in the statute that the decision of the judge rests solely upon legal rules and evidence adduced at the hearing. As a matter of fact, there is no provision for a hearing. The judge who hears the sentencing is not necessarily an impartial official. The judge may feel biased against the defendant because he was dissatisfied with the way the defendant testified; with the fact that the defendant fought the case, or for any multitude of other reasons. The sentencing judge is not necessarily the jurist who presided over all the proceedings concerning the criminal charge. Even if the sentencing judge did hear all the criminal proceedings, since he is not infallible, the rules of evidence should still be relied upon.

There is no requirement of the statute that the judge state the reasons for his determination.

There is no requirement in the statute that the decision-maker must indicate what evidence he relies upon in making the decision.

#### IV. CHARGING INDIGENT DEFENDANTS THE COST OF APPOINTED COUNSEL AS A CONDITION OF PROBATION DENIES EQUAL PROTECTION OF LAW.

##### A

The indigent accused who foregoes his constitutional right to counsel may be rewarded by receiving a lighter sentence than a similarly situated defendant who seeks representation by counsel. Those poor persons who seek fair treatment within the court system through representation by counsel are thereby established as a class of persons

apart, to receive special punishment. Those poor persons who either reject the basic concepts of the adversary system or fear the costs involved, and therefore turn down the offer of counsel receive less harsh treatment.

### B

In Oregon, a non-indigent defendant who retains his own counsel, and has a dispute as to fees faces an entirely different situation from the indigent. The non-indigent can force his attorney to file a civil action for his services. A civil action, of course, would meet the due process requirements of *Goldberg v. Kelly* (supra.). Those due process rules are not permitted the poor. The non-indigent also has a right to have a jury determine the issues.

Oregon Constitution Article I, § 17, "Jury Trial In Civil Cases":

"In all civil cases the right to trial by jury shall remain inviolate."

The indigent, under the Oregon practice, has no right to have a jury determine a factual dispute as to fees due counsel.

### C

The non-indigent defendant in a criminal case in Oregon who does not pay his privately retained attorney cannot be imprisoned for the failure to pay such counsel. Article I, Section 19, Oregon Constitution: "There shall be no imprisonment for debt, except in case of fraud or absconding debtors." However, under ORS 161.665 and ORS 161.675 an indigent defendant in a criminal case who is ordered to pay his court-appointed counsel as a condition of probation may be imprisoned for failure to pay such

counsel as a violation of the terms and conditions of such probation. If an indigent defendant may not be imprisoned for failure to pay a fine (*Tate v. Short*, 401 U.S. 395), surely an indigent should not be imprisoned for failure to pay the costs of his court-appointed counsel.

Respectfully submitted,

NATIONAL LEGAL AID AND  
DEFENDER ASSOCIATION

Richard S. Buckley  
Herbert M. Barish



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January 8, 1974

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Mr. Marshall J. Hartman  
Associate Director NLADA  
1155 East 50th Street  
Chicago, Illinois

Dear Mr. Hartman:

I would be more than happy to have the NLADA file an amicus curiae brief in the case of Fuller vs. Oregon, Supreme Court Case No. 73-5280.

Very truly yours,

J. MARVIN KUHN  
 Deputy Public Defender

-JMK:kg

LEE JOHNSON  
ATTORNEY GENERAL

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DEPUTY ATTORNEY GENERAL



DEPARTMENT OF JUSTICE

APPELLATE DIVISION  
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January 24, 1974

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19-101 Criminal Courts Building  
210 West Temple Street  
Los Angeles, California 90012

Re: Fuller v. Oregon, No. 73-5280

Dear Mr. Barish

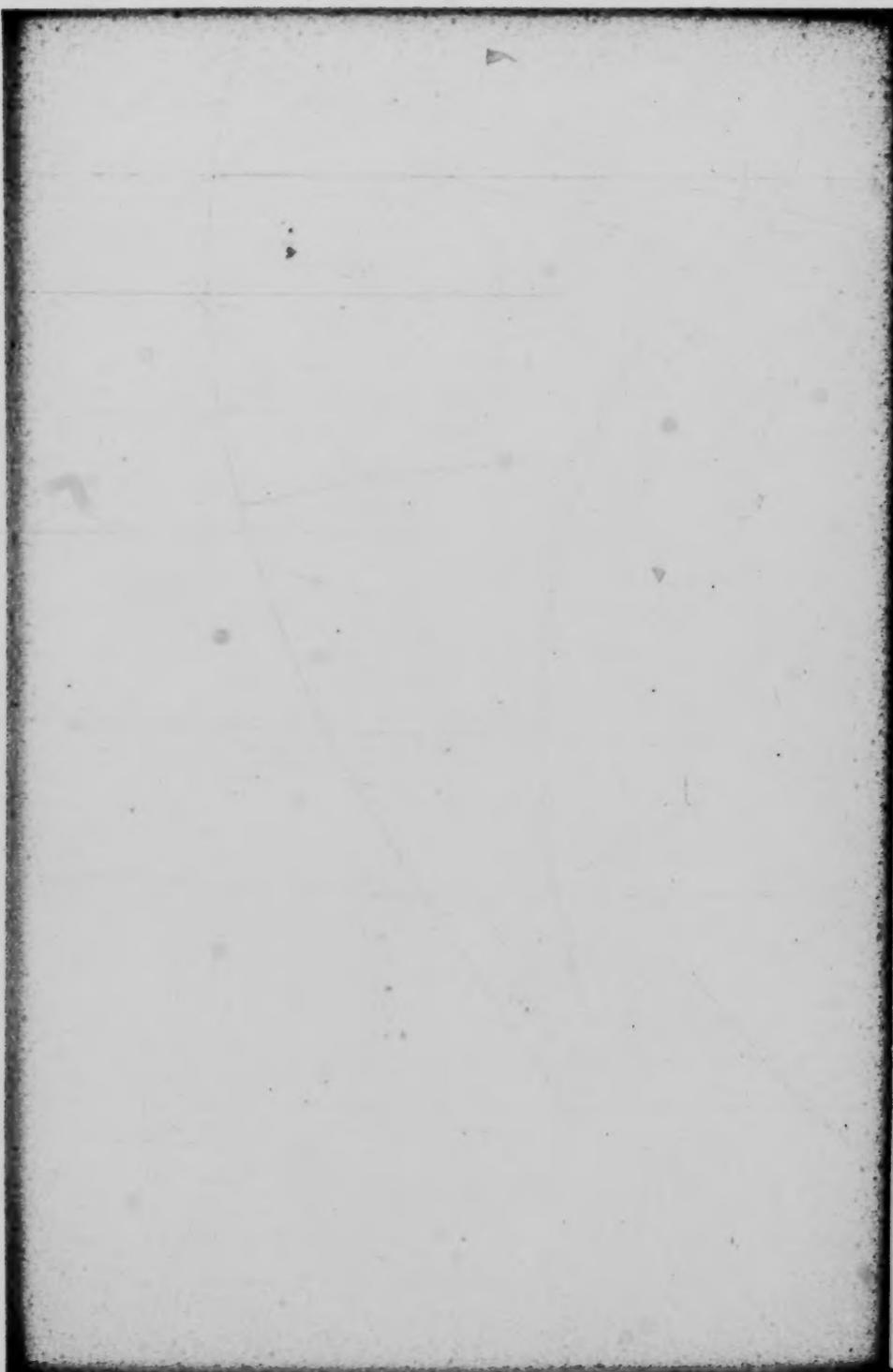
Confirming our telephone conversation of January 24, 1974, I have no objection to your filing a brief as amicus curiae in the above case.

Sincerely

M. MICHAEL GILLETTE  
Solicitor General  
Of Attorneys for Respondent

cc: Michael Rodak, Jr.  
Clerk  
United States Supreme Court  
Washington, D. C. 20543

J. Marvin Kuhn  
Deputy Public Defender  
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Salem, Oregon 97310



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**In the Supreme Court  
of the United States**

**OCTOBER TERM, 1973**

**No. 73-5280**

**PRINCE ERIC FULLER,**

**Petitioner,**

**v.**

**STATE OF OREGON,**

**Respondent.**

**On Writ of Certiorari to the Court of Appeals  
of the State of Oregon**

**BRIEF FOR RESPONDENT**

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Attorney General of Oregon**

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**In the Supreme Court  
of the United States**

OCTOBER TERM, 1973

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No. 73-5280

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PRINCE ERIC FULLER,

Petitioner,

v.

STATE OF OREGON,

Respondent.

---

On Writ of Certiorari to the Court of Appeals  
of the State of Oregon

---

**BRIEF FOR RESPONDENT**

---

**THE QUESTIONS PRESENTED**

Respondent would except to petitioner's statement of the questions presented, and substitute its own:

1. Does the requirement that a non-indigent criminal defendant, after conviction, reimburse the county for his court-appointed attorney's fees as a condition of probation violate the Equal Protection Clause of the United States Constitution?
2. Is a requirement that a non-indigent criminal defendant, after conviction, reimburse the county for his court-appointed attorney's fees an impermissible restriction of the right to counsel as guaranteed by the Sixth and

## Fourteenth Amendments to the Constitution of the United States?

### STATEMENT OF THE CASE

Respondent excepts to that portion of petitioner's statement of the case which suggests that the Oregon Court of Appeals considered and passed on petitioner's claim that certain of his conditions of probation denied him due process of law, as opposed to equal protection of the laws. Petitioner's statement of the case is otherwise accepted.

### SUMMARY OF ARGUMENT

The Oregon statutory scheme for recoupment of costs of court-appointed counsel does not deny petitioner equal protection of the laws, inasmuch as the scheme only takes effect when and if petitioner is no longer indigent and is therefore fully capable of meeting his financial obligation.

The Oregon statutory scheme for recoupment of costs of court-appointed counsel does not deny petitioner due process of law, in that it contains adequate procedural safeguards to assure that any amount assessed against petitioner is just and equitable; moreover, petitioner failed to properly raise any such due process questions in the court below.

The Oregon statutory scheme for recoupment of costs of court-appointed counsel does not create a "chilling effect" on petitioner's right to counsel, inasmuch as the

applicability of the scheme to petitioner at the time counsel is appointed is at best speculative and the likelihood that the possible imposition of such a condition would dissuade a criminal defendant from asking for legal assistance is minimal.

## **ARGUMENT**

### **Statutory Scheme**

Any adequate reply to the contentions of petitioner and the *amicus* requires a far more thorough examination of the total statutory scheme under which Oregon supplies counsel for indigent criminal defendants than petitioner or the *amicus* have seen fit to supply. Respondent therefore provides its own:

#### **1. Right to Counsel.**

In Oregon, recognition of the verity that one accused of crime must be represented by counsel, and such counsel should be appointed if the defendant is indigent, far antedated *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799, 93 ALR 2d 733 (1963). Art. I, Sec 11 of the Oregon Constitution provides:

*"Rights of accused in criminal prosecution.* In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and

consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment." (emphasis supplied)

Neither will just any counsel suffice; the appointment must go to one who is, by experience and skill, prepared to adequately represent defendant as the type of case and facts demand. *State v. Bouse*, 199 Or 676, 264 P2d 800 (1953). This right to appointed counsel in Oregon was extended to indigent defendants in all criminal cases in *Stevenson v. Holzman*, 254 Or 94, 458 P2d 414 (1969), fully three years before this Court decided that a similar extension was a requirement of due process in *Argersinger v. Hamlin*, 407 US 25, 92 S Ct 2006, 32 L Ed 2d 530 (1972).

When a criminal defendant is arraigned upon an indictment in circuit court—the Oregon court of general trial jurisdiction—he is immediately entitled to appointed counsel. ORS 135.320 provides:

"Court appointment of counsel; waiver. If upon arraignment of a person accused in the circuit court of a crime against the laws of this state, the person being arraigned appears without counsel, the court having jurisdiction of the case, in accordance with ORS 133.625, shall appoint suitable counsel to represent

him unless the person waives counsel and the court approves the waiver."

The fees which appointed counsel may thereafter receive for performing services for the indigent defendant are controlled by ORS 135.330:

*"Appointed counsel's fee; expenses; payment of expenses and fee.* (1) Counsel appointed pursuant to ORS 133.625 or 135.320, if other than the Public Defender, shall, by order of the court, and subject to the approval of the governing body of the county, be paid by the county in which the proceeding is had, fair compensation for representation in the case, and the necessary disbursements. In no event shall the minimum compensation for services rendered in conducting the defense be less than the fees set forth in the following schedule:

"(a) When the accused is charged with a misdemeanor, and a plea of 'guilty' is entered, \$25.

"(b) When the accused is charged with a misdemeanor, and a plea of 'not guilty' is entered, \$50 per day of trial, but not exceeding two days in any one case.

"(c) When the accused is charged with a felony, and a plea of 'guilty' is entered, \$50.

"(d) When the accused is charged with a felony, and a plea of 'not guilty' is entered, \$100 per day of trial, but not exceeding five days in any one case.

"(e) When the accused is before the court for any proceedings other than those referred to in paragraphs (a), (b), (c) and (d) of this subsection, \$50 per day, but not exceeding two days in any one case.

"(f) In extraordinary circumstances, payment in excess of the limits stated herein may be made if the presiding judge of the circuit court certifies that such payment is necessary to provide fair compensation for protracted representation in the case.

"(2) The person for whom counsel has been appointed is entitled to a reasonable sum for investigation, preparation and presentation of his case and he or his counsel may upon cause shown, which need not be disclosed to the district attorney prior to any hearing, secure approval and authorization of payment of such sums as the court finds are necessary and proper in the investigation, preparation and presentation of his case, including but not limited to travel, telephone calls, photocopying or other reproduction of documents and expert witness fees.

"(3) Upon completion of all services by the attorney or attorneys so appointed under ORS 135.320, the attorney or attorneys shall submit to the court an affidavit containing an accurate statement of all reasonable expenses of investigation and preparation paid or incurred, supported by appropriate receipts or vouchers. The court shall thereupon enter an order directing the county to pay to such attorney or attorneys the amount of the expenses, or such portion thereof as may be approved by the court."

Both ORS 135.320 and 135.330 have their origin in Or Laws 1937, ch 406, which—twenty-six years before *Gideon*—provided for appointment of counsel for indigent defendants and set a schedule of fees. In 1961, contemporaneous with *Hamilton v. Alabama*, 368 US 52, 82 S Ct 157, 7 L Ed 2d 114 (1961), and prior to the advancing "critical stage" decisions exemplified by *United States v. Wade*, 388 US 218, 87 S Ct 1926, 18 L Ed 2d 1149 (1967), *Gilbert v. California*, 388 US 263, 87 S Ct 1951, 18 L Ed 2d 1178 (1967) and *Coleman v. Alabama*, 399 US 1, 90 S Ct 1999, 26 L Ed 2d 387 (1970), the availability of appointive counsel was significantly expanded to include many circumstances occurring prior to the arraignment on an indictment before a circuit court.

See Or Laws 1961, ch 696. Availability has continued to expand. ORS 133.625 at present provides:

"*Court appointment of counsel.* (1) Suitable counsel for a defendant shall be appointed by a circuit court if:

"(a) The defendant is before a court or magistrate on a matter described in subsection (3) of this section; and

"(b) The defendant requests aid of counsel; and

"(c) The defendant makes a verified financial statement and provides other information in writing under oath showing his lack of ability to obtain counsel and provide any other information required by the court as to his inability to obtain counsel; and

"(d) It appears to the court that the defendant is without means and is unable to obtain counsel.

"(2) If the defendant is before a justice or district court in any proceeding described in subsection (3) of this section, and complies with the provisions of subsection (1) of this section, the magistrate shall forward to the circuit court in his judicial district all information obtained under subsection (1) of this section, along with his recommendations as to whether or not the defendant is without means and is unable to obtain counsel. The circuit court may thereupon appoint suitable counsel for the defendant.

"(3) Counsel must be appointed for a defendant who meets the requirements of subsection (1) of this section and who is before the court or magistrate on any of the following matters:

"(a) Charged with a crime for which a felony sentence could be imposed.

"(b) For a hearing to determine whether an enhanced sentence should be imposed when such proceedings may result in the imposition of a felony sentence.

"(c) For extradition proceedings under the provisions of the Uniform Criminal Extradition Act.

"(d) For any proceeding concerning an order of probation, including but not limited to the revoking or amending thereof.

"(4) Unless otherwise ordered by the court, the appointment of counsel under this section shall continue during all criminal proceedings resulting from the defendant's arrest through acquittal or the imposition of punishment. The court having jurisdiction of the case may substitute one appointed counsel for another at any stage of the proceedings when the interests of justice require such substitution.

"(5) If, at any time after the appointment of counsel, the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the services of counsel, the court may terminate the appointment of counsel or require such partial payment or enter an order against the defendant in favor of the county for such fees as the county has paid and for which the defendant is liable under ORS 137.205. If, at any time during criminal proceedings, the court having jurisdiction of the case finds that the defendant is financially unable to pay counsel whom he has retained, the court may appoint counsel as provided in this section."

The effective scope of ORS 133.625 has been even broader since *Stevenson v. Holzman, supra*.

Expenses and fees are provided in ORS 133.635:

"Appointed counsel's affidavit of expenses; payment of expenses and fees. Upon completion of all services by the counsel so appointed under ORS 133.625, the counsel shall submit to the court an affidavit containing an accurate statement of all reasonable expenses paid or incurred in connection with such services, supported by appropriate receipts or vouchers. The court shall thereupon enter an order

directing the county in which the proceeding is had to pay the counsel the amount of the expenses, or such portion thereof as may be approved by the court, together with fees as set forth in subsection (1) of ORS 135.330."

Thus it can be seen that, in Oregon, an indigent defendant receives court-appointed counsel at the earliest possible moment, thereby assuring the availability of counsel at every stage at which he is needed. The decision to appoint is made on the basis of a brief, verified statement from defendant that he cannot retain his own attorney. The emphasis is upon supplying immediate professional help.

It is against this background of early and ever-expanding concern for the provision of counsel for indigent criminal defendants, culminating in the *Stevenson* decision, that the particular statutory provisions under attack by petitioner must be examined and judged.

## 2. Recoupment Statutes.

Like the federal government and a number of other jurisdictions<sup>①</sup> Oregon has provided for a way in which, under very limited circumstances, some or all of the funds expended by the county in supplying counsel to an indi-

<sup>①</sup> See, e.g., 18 USC § 3006 A (f); Ala Code, Tit 15, § 318 (13) (Supp 1969); Fla Stat Ann § 27.56 (Supp 1972-1973); Idaho Code § 19-858 (Supp 1971); Ind Ann Stat § 9-3501 (Supp 1970); Iowa Code Ann § 775.5 (Supp 1972); Md Code Ann, Art 26, § 12C (Supp 1971); NM Stat Ann § 41-22-7 (Supp 1971); ND Cent Code § 29-07-01.1 (Supp 1971); Ohio Rev Code Ann § 2941.51 (Supp 1971); SC Code Ann § 17-283 (Supp 1971); Tex Code Crim Proc, Art 1018 (1968); Va Code Ann § 14.1-184 (Supp 1971); W Va Code Ann § 62-3-1 (Supp 1971); Wis Stat Ann § 256.66 (1971). The Kansas recoupment statute, Kan Stat Ann § 22-4513 (Supp 1971), was held unconstitutional in *James v. Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972).

gent criminal defendant may be recouped. ORS 161.665-161.685 provide:

“161.665 Costs. (1) The court may require a convicted defendant to pay costs.

“(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

“(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

“(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675.”

“161.675 Time and method of payment of fines and costs. (1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

“(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may

make payment of the fine or costs a condition of probation or suspension of sentence."

"161.685 *Effect of nonpayment of fines or costs.*

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each \$25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for nonpayment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

"(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the

amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

"(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

By its decision in the present case, the Oregon Court of Appeals has now authoritatively interpreted these provisions:

"Oregon's recoupment statute provides that a defendant shall not be sentenced to repay costs 'unless the defendant is or will be able to pay them,' and that the court may consider 'the nature of the burden that payment of costs will impose,' including 'manifest hardship on the defendant or his immediate family.' ORS 161.665 (3) and (4). Thus, an indigent defendant is entitled to free counsel immediately (which is when he needs it), but may be later required to repay this cost if he 'is or will be' able to do so, that is, if he has ceased or likely will cease to be indigent. A defendant is not denied counsel while he is indigent, and he is required to repay appointed counsel's fee only if and when he is no longer indigent. If there is no likelihood that a defendant's indigency will end, a judgment for costs cannot be imposed. ORS 161.665 (3). If there appears to be the future possibility of ability to repay at the time of sentencing, but the defendant remains an indigent, the judgment for costs cannot be collected. The court retains jurisdiction to determine ability to pay. No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes. ORS 161.665 to ORS 161.685 neither denies a defendant the right to counsel, nor discriminates against him because of poverty.

“Where payment of costs is made a condition of probation the possibility exists that a defendant may not only have judgment for the costs entered against him, but he may, in fact, be subject to revocation of his probation. However, it is clear from the tenor of the recoupment statute that the discretion of the trial court to revoke probation for nonpayment of costs is sharply limited. Such revocation may only occur if the court specifically finds: (1) the defendant has the present financial ability to repay the costs involved (either all or by installments) without hardship to himself or his family, *cf.*, ORS 161.665 (4); *and* (2) the defendant's failure to repay (either all or by installments) is an intentional, contumacious default, *cf.*, ORS 161.665 (4). If the evidence adduced at a revocation hearing does not establish both of the above elements, not only is revocation improper, but the trial court may well consider remission of the unpaid costs pursuant to ORS 161.665 (4). Given these substantial limitations on a trial court's authority to revoke probation for nonpayment of costs, we perceive no constitutional infirmity with a sentence that places a defendant on probation on condition that he repay costs.

“A sentencing court may very possibly consider the repayment of the expenses of prosecution, like that of restitution to the victim of crime, ORS 137.540 (1), rehabilitative. We see no good reason why a defendant should have the right to refuse to make restitution or pay costs imposed against him as a result of his own wrongdoing if in the future it is determined that his circumstances have changed so that he is able to pay without any hardship to himself or his immediate family. In many instances rehabilitation may involve a defendant's doing the best he can to redress his victims, which may include both a particular victim and society as a whole.” (footnote omitted) (em-

phasis in original) *State v. Fuller*, — Or App —, 504 P2d 1393, 1396-1397 (1973) (A. 11-13).

From this interpretation of the applicable Oregon statutes, petitioner has sought review by this Court.

#### Petitioner's Contentions

Petitioner attacks the Oregon statutory scheme for recoupment of the cost of court-appointed counsel from those who, subsequent to the appointment of counsel, are no longer indigent.<sup>®</sup> The attack is mounted on three broad fronts: equal protection, due process and "chilling effect." Among others, petitioner raises questions reserved in two previous rulings of this Court, *James v. Strange, supra* and *Rinaldi v. Yeager*, 384 US 305, 76 S Ct 1497, 16 L Ed 2d 577 (1966).

#### I

#### THE OREGON RECOUPMENT STATUTES DO NOT DENY PETITIONER EQUAL PRO- TECTION OF THE LAWS BECAUSE THEY DO NOT SINGLE OUT AN IMPERMIS- SIBLE CLASS.

Petitioner seeks to attack the Oregon statutes as violative of his right to equal protection of the laws under the Fourteenth Amendment, US Const.Amend. XIV, § 1.<sup>®</sup>

<sup>®</sup> Loss of indigency status is a necessary condition precedent before the Oregon statute can be applied, as is made patent by the decision of the Oregon Court of Appeals from which the instant petition for certiorari has been prosecuted. *Ibid.*

<sup>®</sup> What is required, in order to permit the state statutory scheme to pass equal protection scrutiny, is "some rationality" in singling out the class with which the statutes deal. *James v. Strange, supra*, 407 US at 140; *Rinaldi v. Yeager, supra*, 384 US at 308-309. As this Court has elsewhere phrased it:

" . . . [M]ultiple legislative classifications and groupings . . .  
(Continued on page 15)

In support of this contention, he advances a variety of theories:

Petitioner first contends that the Oregon statutory scheme is defective for the same reason that led to this Court striking down the Kansas recoupment statute in *James v. Strange, supra*, i.e., it fails to provide that the judgment for costs (which include attorney fees) under ORS 161.685 (1) and (6) is subject to the exemptions from execution provided other debtors. In this contention, petitioner is wrong. As the Oregon Court of Appeals has noted, "No denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes." *State v. Fuller, supra*, 504 P2d at 1397 (A. 12). See, ORS 137.180; 137.450; 18.320; 18.350; 18.400; 23.160-23.270. Petitioner's insistence that the granting of such exemptions appear in the recoupment statute itself is unreasonable; it is enough for the Oregon court to find (as it has) that the exemptions apply.

Petitioner next argues that the recoupment statutes deny equal protection of the laws because they apply only to those who have been found guilty "and [do] not apply to those indigent defendants who, although they

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require only some rational basis to sustain them." *McGinnis v. Royster*, 410 US 263, 93 S Ct 1055, 35 L Ed 2d 282, 288 (1973).

"... [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowen v. Maryland*, 366 US 420, 425-426, 81 S Ct 1101, 6 L Ed 2d 393 (1961).

may have been represented by court-appointed counsel, were fortunate enough to their cases dismissed or who were acquitted after trial by jury." (Pet. Br. 11).<sup>6</sup> Such a distinction is a valid and appropriate one for the state to draw. See *Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 Mich L Rev 1404, 1418; *Note, Charging Costs of Prosecution to the Defendant*, 59 Georgetown L J 991, 998-999 (1971). Under it, only those persons shown beyond a reasonable doubt and to a moral certainty to be guilty of a crime (and, thus, to be responsible for the necessity of expending public funds for their attorney) are subject to recoupment. Of the residuum, some may be innocent so that the imposition of further burden on them (even if they are now capable of paying) offends any traditional sense of fairness. Some others, of course, committed the offense but achieved discharge or acquittal because of the high burden of proof faced by the prosecution. There might be valid policy grounds for requiring that this group, too, pay for their counsel (again assuming, as with those in the guilty group who will be required to pay, that they are now capable of paying), but identification of these individuals would necessitate a subsequent proceeding with the civil burden of proof, surely a counterproductive effort on behalf of the state coffers in view of the relatively small amounts originally involved and the necessity of re-enacting the earlier trial.

Petitioner also asserts—though without citing any

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<sup>6</sup> Petitioner inadvertently omits mention that those acquitted in a trial to the court sitting without a jury are likewise exempt.

authority—that very few Oregon State Penitentiary or Oregon State Correctional Institution inmates have been required to repay costs. The statute makes no such distinction. See ORS 161.655 (1), *ante*, at 10. Accepting this proposition to be true, however, it does nothing to demonstrate any kind of invidious discrimination between those incarcerated and those placed on probation. Rather, it recognizes that one who was indigent when placed on trial is unlikely to have improved upon his condition either before going to or while residing in a state institution. To impose the requirements in the majority of cases in the hope that an inmate might someday come into adequate funds would be to indulge in profitless speculation.

Nothing in the statute, however, prevents imposition of a requirement that a convicted defendant who is confined to the penitentiary pay costs, if it should appear at the time of sentencing that he would be able to do so. The present case is thus totally unlike *Rinaldi v. Yeager*, *supra* where a New Jersey statute was declared unconstitutional because it mandated discriminatory treatment of unsuccessful indigent criminal appellants who were incarcerated, on the one hand, as opposed to unsuccessful indigent criminal appellants who were fined, given suspended sentences or placed on parole, on the other. Under Oregon law, all convicted defendants are potentially subject to the same requirement of repayment of costs.<sup>®</sup>

<sup>®</sup> Petitioner would find a violation of *Rinaldi* in the fact that those  
(Continued on page 18)

Indigency, traditionally, is a suspect class, as it should be. See, e.g., *Griffin v. Illinois*, 351 US 12, 19, 76 S Ct 585, 100 L Ed 891 (1956). But the Oregon statute applies to another class entirely: those who are not indigent, who are able to pay. The class has one other common characteristic: it consists of those who have been convicted of a crime. This latter class is surely a valid one; if it is not, the whole structure of punishment for violation of the criminal law is lost. Thus viewed, this class of convicted criminal defendants who have or will have the means to reimburse the county for the cost of their court-appointed counsel is not unreasonable and should survive constitutional scrutiny. See *McGinnis v. Royster*, *supra*.

## II

PETITIONER HAS NOT PROPERLY RAISED ANY CLAIM THAT THE OREGON RECOUPMENT STATUTES DENY HIM DUE PROCESS OF LAW; EVEN IF SUCH CLAIM IS PROPERLY PRESENTED, THE STATUTES, TAKEN AS A WHOLE, PROVIDE ADEQUATE DUE PROCESS PROTECTIONS.

Although prominently mentioned as a ground for appeal, very little of petitioner's brief speaks to any alleged deprivation of petitioner's rights under the Due Process Clause of the Fourteenth Amendment, U. S. Const. Amend. XIV, § 1.

Petitioner's due process attack consists of two contentions: (1) the state has failed to show that collection

(Continued from page 17)

acquitted are absolved from repayment responsibilities (Pet Br 12). However, as demonstrated earlier, this distinction between those convicted and those acquitted is appropriate. See discussion at p 15-16, *infra*.

through the judiciary's use of conditions of probation is appropriate; and (2) petitioner may be subject to a judgment for attorney fees without a notice and hearing because the statute does not specifically provide for such notice and hearing.<sup>®</sup>

<sup>®</sup> Neither of these contentions was raised in the courts below. Petitioner's initial claim before the Oregon Court of Appeals was that

"The court also imposed as a condition of defendant's probation the requirement that he pay the cost of his attorney's fees as well as \$375.00 for the cost of the defense attorney's investigator (Tr 13). Defendant believes that such a condition is unreasonable because it is grossly unfair for the state to try and convict an indigent defendant and then require him to pay for the cost of his defense. Defendant is of the opinion that this denies him equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 20 of the Oregon Constitution. See *James v. Strange*, — US —, 92 S Ct —, 32 L Ed2d 600 (1972).

"The reimbursement of the court appointed attorney and investigator's fees, defendant believes, is an unreasonable burden upon him because he is financing his way through school by means of a G I Bill by receiving \$175.00 per month. Defendant was augmenting this sum by selling posters and silk screen work to giftshops on a commission basis (Tr 9-10). From these funds the defendant had to pay tuition, book fees, as well as board and room (Tr 9). A requirement that he reimburse the attorney and pay for the investigatory fees is therefore in defendant's view an unreasonable condition of probation." (Appellant's Brief before Oregon Court of Appeals at 6-7)

Nor did the Court of Appeals recognize such issues as being raised. Their summary of appellant's (petitioner's) contentions made no mention of due process:

" . . . [Petitioner] presents three issues:

"(1) Are fees of appointed defense attorneys and investigation 'costs' which may be assessed against a convicted defendant under ORS 161.665?

"(2) Is such a statute inconsistent with defendant's right to counsel or to equal protection of the laws?

"(3) Assuming a civil recoupment statute is valid under the Sixth and Fourteenth Amendments to the United States Constitution, is the repayment of costs as a condition of probation involving possible imprisonment under certain circumstances for nonpayment impermissible under the Equal Protection Clause?" *State v. Fuller*, *supra*, 504 P2d at 1395-1396 (A. 10).

Petitioner expanded his contentions in his Petition for Rehearing to the  
(Continued on page 20)

Petitioner urges that it is somehow constitutionally impermissible for a court to be given the opportunity to require repayment of costs born by the state in providing a defense for a defendant who is now capable of repaying them.<sup>①</sup> It is difficult to imagine how else the money is to be collected, if collection is proper. Courts are the traditional method by which judgments are obtained. Moreover, an attack which goes to the suitability of courts performing these functions is inappropriate. The efficacy of the procedure adopted by the state is not a matter for review here. The question is not advisability, or even efficiency, but constitutionality. *James v. Strange, supra*, 407 US at 133-134.

There remains the underlying inquiry concerning the existence of a state interest justifying the imposition of *any* procedure. Justification requires only some rational nexus between means and end (not a "compelling interest," as petitioner urges). See *Id.*, at 140; *Rinaldi v. Yeager, supra*, 384 US at 308-309. The purpose of the statute is obvious: recovery of those expenditures from public coffers on behalf of individuals who are in a position to pay them back. Admittedly, where an initial

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(Continued from page 19)

Court of Appeals (Pet for Rehearing 1-5) and his essentially identical Petition for Review to the Oregon Supreme Court (Pet for Review 1-5), both of which were denied without a responsive brief from the state and without oral argument, but neither petition fairly raised nor even suggested the matters now urged. Under these circumstances, they should not be considered by this Court. See *Moore v. Illinois*, 408 US 786, 92 S Ct 2562, 33 L Ed 2d 706 (1972).

<sup>①</sup> As has been previously demonstrated, the statute in question applies only to defendants who have lost (or who will lose) their indigency status. See p 12-13, *infra*.

condition of indigency led to the expenditure in the first place, the prospect of major recovery of funds is very small.<sup>®</sup> Degree of success, however, is not the question; it is enough that there is a valid state purpose. *James v. Strange, supra*, 407 US at 133-134.

Petitioner next raises lack of notice and hearing in connection with the amount taxed to him as attorney fees. He argues:

" . . . [A] defendant who is ordered to make restitution has knowledge of the amount involved while an indigent who must reimburse the county for the cost of the defense not only has no idea of what the cost may be, but is given no opportunity to contest the amount of the assessments made in terms of the value of the services received. When repayment is made a condition of probation, the indigent may even be deprived of his liberty without ever having had a hearing on the reasonableness of the attorney fees or investigatory costs imposed against him. This procedure, or lack of it, in petitioner's opinion, denies him due process . . ." (Pet Br 14-15)

Such argument confuses the facts and misstates the law. As to the facts, since the attorney fees to be awarded are statutory (and minimal), they are specifically known. By

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<sup>®</sup>No figures exist as to the amount of money recovered under this statute. However, an informal survey by counsel for respondent established that the statutory authority is being used in many of Oregon's 36 counties. Respondent is aware of only one instance in which failure to perform this condition of probation has resulted in probation revocation, and even in that case it was combined with more serious transgressions, i.e., failure to report to the probation officer and failure to notify of changes of address. In view of the narrow scope of authority to revoke probation under the statute, see *Fuller v. Oregon, supra*, 504 P2d at 1397 (A. 13), it would be surprising if there were many such cases. See Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn L Rev 1, 24 (1963). The results of the informal survey are tabulated in an Addendum at page 30 of this brief.

contrast, it could very well occur that a requirement that a defendant reimburse a private victim (which condition petitioner seems to consider proper, see Pet Br 13-14) could be very indefinite until some hearing was held to establish the appropriate amount. This would be particularly true with respect to personal injuries. Moreover, a defendant is obviously not foreclosed from contesting the amount, after it has been set, both by application to the trial court and on appeal. See *Whitley v. Murphy*, 5 Or 328, 333 (1874). Review would also be available on any hearing concerning default, inasmuch as the element of "intentional, contumacious default" which must be found at such hearing would appear to require, at least, a finding that the amount the probationer was being required to pay was fair and reasonable. See *State v. Fuller, supra*, 504 P2d at 1397 (A 12).<sup>6</sup>

### III

#### THE OREGON RECOUPMENT STATUTES HAVE NO APPRECIABLE "CHILLING EF- FECT" ON PETITIONER'S EXERCISE OF HIS RIGHT TO COUNSEL.

Petitioner's final attack on the Oregon recoupment statutes is based on the theory that the mere existence of the possibility that the statutes will be applied to a defendant after conviction will somehow "chill" his exer-

<sup>6</sup> *People v. Amor*, 35 Cal App 3d 344, 110 Cal Rptr 701 (1973) is cited by petitioner for the contrary position. The California Supreme Court granted review of *Amor* on January 10, 1974, creating a question as to its precedential value.

cise of his right to counsel under the Sixth and Fourteenth Amendments, US Const. Amends. VI and XIV, by making such exercise costly.

This Court has, on at least two occasions, commented by way of *dicta* that imposing a requirement of reimbursement to the state for the expense of court-appointed counsel would be permissible:

" . . . We note here also that the state interests represented by recoupment laws may prove important ones. Recoupment proceedings may protect the State from fraudulent concealment of assets and false assertions of indigency. Many States, moreover, face expanding criminal dockets, and this Court has required appointed counsel for indigents in widening classes of cases and stages of prosecution. Such trends have heightened the burden on public revenues, and recoupment laws reflect legislative efforts to recover some of the added costs. Finally, federal dominance of the Nation's major revenue sources has encouraged State and local governments to seek new methods of conserving public funds, not only through the recoupment of indigents' counsel fees but of other forms of public assistance as well.

"We thus recognize that state recoupment statutes may betoken legitimate state interests. . . ." (footnotes omitted) *James v. Strange*, *supra* 407 US at 141.

" . . . We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures. . . ."

" . . . [R]epayment could easily be made a condition of probation or parole, . . . ." (footnote omitted) *Rinaldi v. Yeager*, *supra*, 384 US at 309-310.

Every one of the possible reasons suggested by this Court applies with some force to the statutes under

scrutiny here. Recovery of expenditures is one of the prime motivations for such statutes. They do, however, serve other ends as well. For example, the ultimate availability of a fairly thorough examination of a criminal defendant's financial circumstances after conviction makes it possible for the original arraigning magistrate to proceed rather summarily with a possibly indigent defendant: when in doubt, the defendant can be given an attorney; if the defendant has (or thereafter acquires) funds, the fact will come out.

Yet another consideration is the fact that the recoupment statutes lessen concern for fraudulent representations of indigency. As long as it is proper to require repayment when it is found that a convicted defendant is not, in fact, indigent, little if any concern need be wasted on consideration of whether or not to seek charges with respect to executing a false affidavit of indigency. Proof problems concerning state of mind and intent are avoided; the criminal justice system avoids the possibility of yet another case to add to its burden.

Finally, there is the legitimate concern for rehabilitation. In Oregon, rehabilitation is the declared goal of the criminal justice system. Article I, Section 15 of the Oregon Constitution directs that

"Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."

Courts are every day faced with the task of evaluating the progress of probationers to determine whether or not the probationers' conduct indicates that they are taking

their proper place in society as responsible, law-abiding individuals. A condition of probation which requires repayment of funds for court-appointed counsel furthers this task, by providing an index of an offender's willingness to recognize and take the responsibility for the burden which his past criminal conduct placed upon others.

Petitioner does not argue that the statutes would not accomplish the goals set forth above. Rather, he adopts the absolute position that, because an accused indigent was aware of the possibility that he might someday be called upon to repay the cost of his court-appointed attorney, he might forego seeking legal assistance.\* In this contention, petitioner purports to find support in *In re Allen*, 71 Cal 2d 388, 78 Cal Rptr 207, 455 P2d 143 (1969), and in certain decisions of this Court.

In *Allen*, a condition similar to the one in the present case had been imposed, although without any specific statutory authorization and, apparently, without any statutory limitation as to the attorney fees which could be awarded. *Id.*, 455 P2d at 146. The California Supreme Court held that the condition of probation represented a potential chilling influence on future indigents' decisions concerning acceptance of appointed counsel. However, the basis for this decision was rank speculation:

". . . [W]e believe that as knowledge of this practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event

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\* In this case, of course, petitioner was not aware of this possibility. No "chilling effect" with respect to petitioner exists.

the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the Court in *Gideon*, *supra*. Although in the instant case there is no indication in the record that petitioner was discouraged from exercising her constitutional right to counsel for, in fact, she requested and received counsel, neither does the record show that she might become indebted to the county for the cost of such service. The fact that such knowledge might have deterred her, and could well deter others, gives rise to our concern as to the validity of such a condition of probation." *Id.* 455 P2d at 144.

The assertion upon which the holding is based is *ipse dixit*.<sup>®</sup> It promotes a theoretical possibility to an absolute constitutional barrier. Respondent respectfully submits that a "chilling effect" should be made of sterner stuff.

Other "chilling effect" cases relied upon by petitioner include *United States v. Jackson*, 390 US 570, 88 S Ct 1209, 20 L Ed 2d 138 (1968) (Federal Kidnapping Act provision that only jury could impose death penalty held unconstitutional in part because it required a defendant to literally risk his life in order to assert his right to a jury trial); *Gardner v. Broderick*, 392 US 273, 88 S Ct 1913, 20 L Ed 2d 1082 (1968) (police officer witness before grand jury investigating alleged corruption in

<sup>®</sup> Scholarly efforts cited by petitioner in support of this position are equally speculative. See, e.g., A.B.A. Project on Providing Defense Services, 58-59 (Approved Draft 1968). Other commentators would find no constitutional difficulties with a properly limited scheme. See Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, *supra*, at 1413-1414.

police department could not be discharged for refusal to waive privilege against self-incrimination and sign waiver of immunity from prosecution); *Uniformed Sanitation Men Assoc. v. Commissioner*, 392 US 280, 88 S Ct 1917, 20 L Ed 2d 1089 (1968) (discharge for refusal to sign waivers of immunity unconstitutional); *Griffin v. California*, 380 US 609, 86 S Ct 1229, 14 L Ed 2d 106 (1965) (permitting trial court and prosecutor to comment on defendant's refusal to take stand in own defense violates right to remain silent by making its exercise costly).

Each of the cases cited involved a specific, near-Draconian penalty for the exercise of a right. In no case was the penalty minor or speculative. By contrast, the present case involves a potential "penalty" of a requirement that a non-indigent criminal defendant who has had the benefit of court-appointed counsel reimburse the county for the statutory fees the counsel receives for such services. At the time when the services are offered, the defendant is presumably indigent; he is certainly in need of the services. Even if the chance that his circumstances may so improve that he will have to pay for this court-appointed attorney might give him pause, a defendant will surely opt for the help he needs, rather than be frightened into a serious present detriment by the bare possibility of a future obligation. Moreover, accepting representation increases his chances of avoiding potential liability for any costs by increasing his chances of acquittal.

Respondent submits that the facts of the present case

place it squarely within the doctrine of this Court's recent decision in *Chaffin v. Stynchcombe*, 412 US 17, 93 S Ct 1977, 36 L Ed 2d 714 (1973). In that case, it was held that permitting a Georgia jury to sentence defendant to a heavier term of imprisonment on retrial after he had successfully overturned his first conviction was proper, and the possibility that such might be the result on retrial did not create a "chilling effect" either on defendant's right to appeal or his right to select a jury trial on retrial. During a wide-ranging review of relevant precedent, this Court there spoke to issues and policies which closely parallel the present case:

"Petitioner's final argument is that harsher sentences on retrial are impermissible because, irrespective of their causes and even conceding that vindictiveness plays no discernible role, they have a 'chilling effect' on the convicted defendant's exercise of his right to challenge his first conviction either by direct appeal or collateral attack. What we have said as to [*North Carolina v. Pearce*, 395 US 711, 89 S Ct 2072, 23 L Ed 2d 656 (1969)] demonstrates that it provided no foundation for this claim. To the contrary, the Court there intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal." *Chaffin v. Stynchcombe*, *supra*, 36 L Ed 2d at 725.

The Court then went on to quote the opinion of Mr. Justice Harlan in *Crampton v. Ohio*, 402 US 183, 91 S Ct 1454, 28 L Ed 2d 711 (1971):

"The criminal process, like the rest of the legal system, is replete with situations requiring "the mak-

ing of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. [402 US] at 213, 28 L Ed 2d 711[']" *Chaffin v Stynchcombe, supra*, 36 L Ed 2d at 726.

This Court went on to reject a "chilling effect" claim with respect to the right to select a jury trial upon retrial, noting that, "[T]he choice here is subject to considerable speculation." *Chaffin v. Stynchcombe, supra*, 36 L Ed 2d at 727 n. 12. It is precisely this same element of speculation, respondent urges, which should defeat petitioner's argument of "chilling effect" in the present case.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

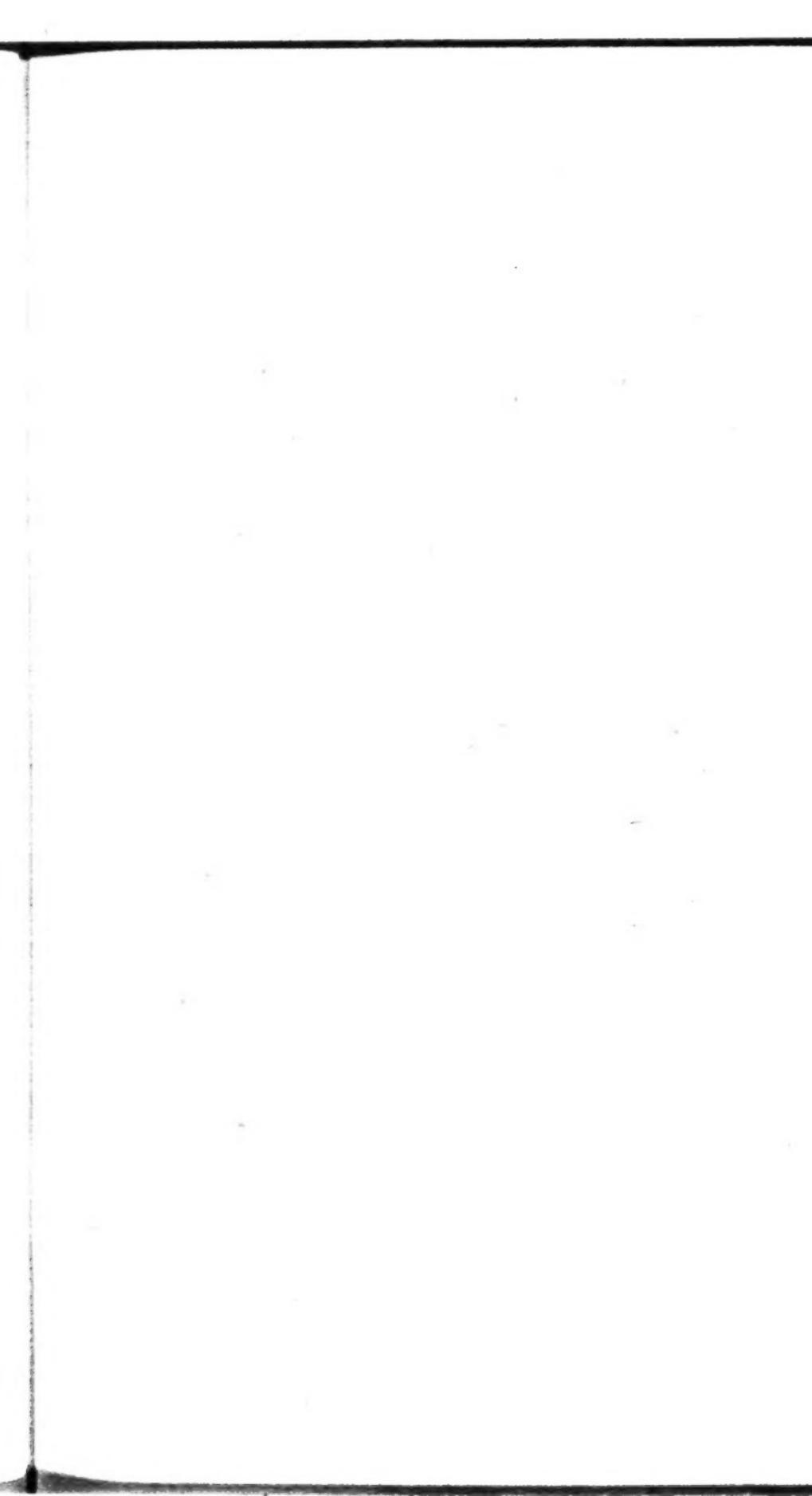
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**ADDENDUM****APPLICATION OF ORS 161.675—PRELIMINARY SURVEY**

County	Statute Utilized; Repayment a Condition of Probation	Number of Individuals Presently Making Payment	Amount Collected In 1973	Probation Revoked as Result of Failure to Comply
Baker	No			No
Benton	Yes	2	\$ 275.00	Y <del>10</del> Yes
Clackamas	Yes	13*	9,220.00	<del>45</del> No**
Clatsop	No			No
Columbia	Yes	2	—0—	No
Coos	No			No
Crook	Yes	6	222.99	No
Curry	No			No
Deschutes	Yes	4	1,507.95	No
Douglas	Yes	0	842.00	No
Gilliam	No			No
Grant	Yes	7	195.00	No
Harney	No			No
Hood River	Yes	2	250.00	No
Jackson	Yes			No
Jefferson	Yes	1	255.97	No
Josephine	Yes	34	105.00	No
Klamath	Yes	27	1,699.02	No
Lake	No			No
Lane	No			No
Lincoln	No			No
Linn	No			No
Malheur	Yes	26	5,123.23	No
Marion	No			No
Morrow	No			No
Multnomah	Yes			No
Polk	Yes	46	2,259.66	No
Sherman	No			No
Tillamook	Yes	3	255.00	No
Umatilla	No			No
Union	Yes	1	396.05	No
Wallowa	No			No
Wasco	No			No
Washington	Yes			No
Wheeler	No			No
Yamhill	Yes	50	1,728.90	No

\* Number earlier was as high as 56.

\*\* One revocation, based not only on failure to pay but also on additional factors of failure to make monthly reports and failure to notify probation officer of current address.



**FULLER v. OREGON****CERTIORARI TO THE COURT OF APPEALS OF OREGON**

No. 73-5280. Argued March 26, 1974—Decided May 20, 1974

Petitioner, who pleaded guilty to a crime and was given a probationary sentence, conditioned upon his complying with a jail work-release program permitting him to attend college and also upon his reimbursing the county for the fees and expenses of an attorney and investigator whose services had been provided him because of his indigency, attacks the constitutionality of Oregon's recoupment statute, which was upheld on appeal. That law requires convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently acquire the financial means to do so, to repay the costs of their legal defense. Defendants with no likelihood of having the means to repay are not even conditionally obligated to do so, and those thus obligated are not subjected to collection procedures until their indigency has ended and no manifest hardship will result.

*Held:*

1. The Oregon recoupment scheme does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 46-50.

(a) The statute retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show that recovery of legal defense costs will impose "manifest hardship." *James v. Strange*, 407 U. S. 128, distinguished. Pp. 46-48.

(b) The statutory distinction between those who are convicted, on the one hand, and those who are not or whose convictions are reversed, on the other, is not an invidious classification, since the legislative decision not to impose a repayment obligation on a defendant forced to submit to criminal prosecution that does not end in conviction is objectively rational. Pp. 48-50.

2. The Oregon law does not infringe upon a defendant's right to counsel since the knowledge that he may ultimately have to repay the costs of legal services does not affect his ability to obtain such services. The challenged statute is thus not similar to a provision that "chill[s] the assertion of constitutional rights by penalizing those who choose to exercise them," *United States v. Jackson*, 390 U. S. 570, 581. Pp. 51-54.

12 Ore. App. 152, 504 P. 2d 1393, affirmed.

## Opinion of the Court

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion concurring in the judgment, post, p. 54. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 59.

*J. Marvin Kuhn* argued the cause and filed a brief for petitioner.

*W. Michael Gillette*, Solicitor General of Oregon, argued the cause for respondent. With him on the brief was *Lee Johnson*, Attorney General.\*

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to determine whether Oregon may constitutionally require a person convicted of a criminal offense to repay to the State the costs of providing him with effective representation of counsel, when he is indigent at the time of the criminal proceedings but subsequently acquires the means to bear the costs of his legal defense.

The petitioner Fuller pleaded guilty, on July 20, 1972, to an information charging him with sodomy in the third degree.<sup>1</sup> At the hearing on the plea and in other court proceedings he was represented by a local member of the bar appointed by the court upon the petitioner's representation that he was indigent and unable to hire a lawyer. Fuller's counsel in turn hired an investigator to aid in gathering facts for his defense, and the investigator's fees were also assumed by the State. Fuller was

\*Richard S. Buckley, Marshall J. Hartman, and Wilbur F. Littlefield filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging reversal.

<sup>1</sup>Other charges contained in the information against Fuller were dismissed when his guilty plea was accepted.

## Opinion of the Court

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subsequently sentenced to five years of probation, conditioned upon his satisfactorily complying with the requirements of a work-release program at the county jail that would permit him to attend college, and also upon his reimbursement to the county of the fees and expenses of the attorney and investigator whose services had been provided him because of his indigent status. On appeal to the Oregon Court of Appeals, his principal contention was that the State could not constitutionally condition his probation on the repayment of these expenses.<sup>2</sup> With one judge dissenting, the imposition of his sentence was affirmed, 12 Ore. App. 152, 504 P. 2d 1393, and the Supreme Court of Oregon subsequently denied Fuller's petition for review. Because of the importance of the question presented and the conflict of opinion on the constitutional issue involved,<sup>3</sup> we granted certiorari, 414 U. S. 1111.

<sup>2</sup> In addition, Fuller argued that the section of the Oregon recoupment statute authorizing an obligation to repay "expenses specially incurred by the state in prosecuting the defendant," Ore. Rev. Stat. § 161.665 (2), see n. 5, *infra*, was not intended by the state legislature to include counsel fees. This issue of state law was resolved against the petitioner in the state court, and properly is not raised here. *Murdock v. City of Memphis*, 20 Wall. 590.

<sup>3</sup> Courts of some other States, in reviewing legislation similar to that in question here, have expressed views on the constitutionality of the recoupment of defense costs inconsistent with the decision of the Oregon Court of Appeals in this case. *In re Allen*, 71 Cal. 2d 388, 455 P. 2d 143; *Opinion of the Justices*, 109 N. H. 508, 256 A. 2d 500; *State ex rel. Brundage v. Eide*, 83 Wash. 2d 676, 521 P. 2d 706. Cf. *Strange v. James*, 323 F. Supp. 1230 (Kan.), aff'd on other grounds, 407 U. S. 128. See generally American Bar Association Project on Standards for Criminal Justice, *Providing Defense Services* § 6.4, pp. 58-59 (Approved Draft 1968); Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 Mich. L. Rev. 1404 (1969); Comment, *Charging Costs of Prosecution to the Defendant*, 59 Geo. L. J. 991 (1971).

## I

We begin with consideration of the plan and operation of the challenged statute. By force of interpretation of the State's Constitution and comprehensive legislation, Oregon mandates that every defendant in a criminal case must be assigned a lawyer at state expense if "[i]t appears to the court that the defendant is without means and is unable to obtain counsel." Ore. Rev. Stat. § 135.050 (1)(d).<sup>4</sup> As part of a recoupment statute passed in 1971, Oregon requires that in some cases all or part of the "expenses specially incurred by the state in prosecuting the defendant," § 161.665 (2), be repaid to the State, and that when a convicted person is placed on probation repayment of such expenses may be made a condition of probation.<sup>5</sup> These expenses include the costs of the convicted person's legal defense.<sup>6</sup>

<sup>4</sup> Ore. Rev. Stat. § 135.050 (3) (a) directs that counsel be appointed for an indigent defendant when he is "[c]harged with a crime."

<sup>5</sup> Ore. Rev. Stat. § 161.665 provides:

"(1) The court may require a convicted defendant to pay costs.

"(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

"(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will

[Footnote 6 is on p. 45]

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As the Oregon appellate court noted in its opinion in this case, however, the requirement of repayment "is never mandatory." 12 Ore. App., at 156, 504 P. 2d,

impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675."

Ore. Rev. Stat. § 161.675 provides:

"(1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

"(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence."

Ore. Rev. Stat. § 161.685 provides:

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each \$25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for non-

at 1395. Rather, several conditions must be satisfied before a person may be required to repay the costs of his legal defense. First, a requirement of repayment may be imposed only upon a *convicted* defendant; those who are acquitted, whose trials end in mistrial or dismissal, and those whose convictions are overturned upon appeal face no possibility of being required to pay. Ore. Rev. Stat. § 161.665 (1). Second, a court may not order a convicted person to pay these expenses unless he "is or will be able to pay them." Ore. Rev. Stat. § 161.665 (3). The sentencing court must "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Ibid.* As the Oregon court put the matter in this case, no requirement to repay may be imposed if it appears at the time of sentencing that "there is no likelihood that a defendant's indigency will end . . ." 12 Ore. App., at 159, 504 P. 2d, at 1397. Third, a convicted person under an obligation to repay "may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof." Ore. Rev. Stat. § 161.665 (4). The court is empowered to remit if payment "will impose manifest hardship on the defendant or his imme-

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payment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

"(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

"(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

\* See n. 2, *supra*.

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diate family . . . ." *Ibid.* Finally, no convicted person may be held in contempt for failure to repay if he shows that "his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment . . . ." Ore. Rev. Stat. § 161.685 (2).

Thus, the recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation. Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no "manifest hardship" will result. The contrast with appointment of counsel procedures in States without recoupment requirements<sup>1</sup> is thus relatively small: a lawyer is provided at the expense of the State to all defendants who are unable, even momentarily, to hire one, and the obligation to repay the State accrues only to those who later acquire the means to do so without hardship.

## II

The petitioner's first contention is that Oregon's recoupment system violates the Equal Protection Clause of the Fourteenth Amendment because of various classifications explicitly or implicitly drawn by the legislative provisions. He calls attention to our decision in *James v. Strange*, 407 U. S. 128, which held invalid under the Equal Protection Clause a law enacted by Kansas that

<sup>1</sup> The recoupment provisions of other States are set out in the Court's opinion in *James v. Strange*, 407 U. S. 128, 132-133, and n. 8. The federal reimbursement provision is found in 18 U. S. C. § 3006A (f).

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was somewhat similar to the legislation now before us. But the offending aspect of the Kansas statute was its provision that in an action to compel repayment of counsel fees "[n]one of the exemptions provided for in the code of civil procedure [for collection of other judgment debts] shall apply to any such judgment . . .," Kan. Stat. Ann. § 22-4513 (a) (Supp. 1971), a provision which "strip[ped] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors . . ." 407 U. S., at 135.<sup>4</sup> The Court found that the elimination of the exemptions normally available to judgment debtors "embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Id.*, at 142.

The Oregon statute under consideration here suffers from no such infirmity. As the Oregon Court of Appeals observed, "[n]o denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes." 12 Ore. App., at 159, 504 P. 2d, at 1397. Indeed, a separate provision directs that "[a] judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect . . ." Ore. Rev. Stat. § 137.180. The convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs of his legal defense will impose "manifest hardship," *supra*, at 45-46. The legislation before us,

<sup>4</sup> The Kansas statute allowed only one exception from the blanket denial of exemptions usually available to judgment debtors, permitting debtors upon whom judgments for costs of legal defense were executed to maintain their homesteads intact. 407 U. S., at 135.

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therefore, is wholly free of the kind of discrimination that was held in *James v. Strange* to violate the Equal Protection Clause.\*

The petitioner contends further, however, that the Oregon statute denies equal protection of the laws in another way—by discriminating between defendants who

\* The dissenting opinion today argues that Fuller's conditional obligation to repay constitutes an impermissible discrimination based on wealth in violation of the Equal Protection Clause. More precisely, the argument is made that, unlike a nonindigent defendant, an indigent defendant's "failure to pay his debt can result in his being sent to prison." *Post*, at 60. This contention was not made in the petitioner's brief or oral argument before this Court, and appears not to have been raised in the Oregon courts. It is, therefore, not properly before us. See n. 11, *infra*. Furthermore, insofar as the dissent deals with Art. 1, § 19, of the Oregon Constitution which forbids "imprisonment for debt," the dissent purports to resolve questions of state law that this Court does not have power to decide. *Murdock v. City of Memphis*, 20 Wall. 590.

More fundamentally, the imposition of a repayment requirement upon those for whom counsel was appointed but not upon those who hired their own counsel simply does not constitute invidious discrimination against the poor. Indeed, the entire thrust of Oregon's appointment-of-counsel plan is to insure an indigent effective representation of counsel at all significant steps of the criminal process. Those who are indigent may be conditionally required to repay because only they, in contrast to nonindigents, were provided counsel by the State in the first place. Moreover, the fact that a conditional requirement to repay may be made a condition of probation does not mean that the State "impose[s] unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor." *James v. Strange*, 407 U. S., at 138. Under Oregon's recoupment statute revocation of probation is not a collection device used by the State to enforce debts to it, but is a sanction imposed for "an intentional refusal to obey the order of the court," Ore. Rev. Stat. § 161.685 (2). Since an order to repay can be entered only when a convicted person is financially able but unwilling to reimburse the State, the constitutional invalidity found in *James v. Strange* simply does not exist.

are convicted, on the one hand, and those who are not convicted or whose convictions are reversed, on the other. Our review of this distinction, of course, is a limited one. As the Court stated in *James v. Strange*: "We do not inquire whether this statute is wise or desirable . . . . Misguided laws may nonetheless be constitutional." 407 U. S., at 133. Our task is merely to determine whether there is "some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U. S. 305, 308-309. See also *McGinnis v. Royster*, 410 U. S. 263; *McGowan v. Maryland*, 366 U. S. 420. In *Rinaldi* the Court found impermissible New Jersey's decision to single out prisoners confined to state institutions for imposition of an obligation to repay to the State costs incurred in providing free transcripts of trial court proceedings required by this Court's decision in *Griffin v. Illinois*, 351 U. S. 12. The legislative decision to tax those confined to prison but not those also convicted but given a suspended sentence, probation, or a fine without imprisonment was found to be invidiously discriminatory and thus violative of the requirements of the Equal Protection Clause. In the case before us, however, the sole distinction is between those who are ultimately convicted and those who are not.<sup>10</sup>

We conclude that this classification is wholly non-invidious. A defendant whose trial ends without con-

<sup>10</sup> The petitioner also claims in his brief that a requirement to repay legal defense expenses has been imposed only on convicted defendants placed on probation, and "has not been applied to those convicted indigents who were sentenced to terms of imprisonment." While this distinction might well be justified on the ground that those released on probation are more likely than those incarcerated to have the ability to earn money to repay, we need not reach this issue since the statute itself makes no such distinction, and the petitioner has not demonstrated on this record that the State has engaged in any pattern or practice embracing it.

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viction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged. The imposition of such dislocations and hardships without an ultimate conviction is, of course, unavoidable in a legal system that requires proof of guilt beyond a reasonable doubt and guarantees important procedural protections to every defendant in a criminal trial. But Oregon could surely decide with objective rationality that when a defendant has been forced to submit to a criminal prosecution that does not end in conviction, he will be freed of any potential liability to reimburse the State for the costs of his defense. This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.<sup>11</sup>

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<sup>11</sup> The petitioner's brief also raises, without extended discussion, various due process claims that imposition of the conditional obligation to repay was made without sufficient notice or hearing. Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here. "[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U. S. 576, 582. We note in passing, however, that the recoupment statutes, including a schedule of fees, were published in the Oregon Revised Statutes at the time of the petitioner's plea, and further that both Oregon's judgment execution statute and its parole revocation procedures provide for a hearing before execution can be levied or probation revoked.

## III

The petitioner's second basic contention is that Oregon's recoupment statute infringes upon his constitutional right to have counsel provided by the State when he is unable because of indigency himself to hire a lawyer. *Gideon v. Wainwright*, 372 U. S. 335; *Argersinger v. Hamlin*, 407 U. S. 25. The argument is not that the legal representation actually provided in this case was ineffective or insufficient. Nor does the petitioner claim that the fees and expenses he may have to repay constitute unreasonable compensation for the defense provided him. Rather, he asserts that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus "chill" his constitutional right to counsel.

This view was articulated by the Supreme Court of California, in a case invalidating California's recoupment legislation, in the following terms:

"[W]e believe that as knowledge of [the recoupment] practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the [Supreme] [C]ourt in *Gideon . . .*" *In re Allen*, 71 Cal. 2d 388, 391, 455 P. 2d 143, 144.

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We have concluded that this reasoning is wide of the constitutional mark.

The focal point of this Court's decisions securing the right to state-appointed counsel for indigents was the "noble ideal" that every criminal defendant be guaranteed not only "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law," but also the expert advice necessary to recognize and take advantage of those safeguards. *Gideon v. Wainwright*, 372 U. S., at 344. In the now familiar words of the Court's seminal opinion in *Powell v. Alabama*, 287 U. S. 45, 68-69, quoted in *Gideon*, at 344-345:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Oregon's system for providing counsel quite clearly does not deprive any defendant of the legal assistance necessary to meet these needs. As the State Court of Appeals observed in this case, an indigent is entitled to

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free counsel "when he needs it"—that is, during every stage of the criminal proceedings against him. 12 Ore. App., at 158-159, 504 P. 2d, at 1396. The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.<sup>12</sup> Those who remain indigent or for whom repayment would work "manifest hardship" are forever exempt from any obligation to repay.

We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any

<sup>12</sup> The limitation of the obligation to repay to those who are found able to do so also disposes of the argument, presented by an *amicus curiae*, that revocation of probation for failure to pay constitutes an impermissible discrimination based on wealth. See *Tate v. Short*, 401 U. S. 395; *Williams v. Illinois*, 399 U. S. 235. As the Court stated in *Tate v. Short*: "We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U. S., at 400.

Similarly, the wording of Oregon's statute makes it clear that a determination that an indigent "will be able" to make subsequent repayment is a condition necessary for the initial imposition of the obligation to make repayment, but is not itself a condition for granting probation, or even a factor to be considered in determining whether probation should be granted.

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obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

This case is fundamentally different from our decisions relied on by the petitioner which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right. See *Uniformed Sanitation Men v. Sanitation Comm'r*, 392 U. S. 280; *Gardner v. Broderick*, 392 U. S. 273; *United States v. Jackson*, 390 U. S. 570. Unlike the statutes found invalid in those cases, where the provisions "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," *United States v. Jackson*, *supra*, at 581, Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.

The judgment of the Court of Appeals of Oregon is affirmed.

*It is so ordered.*

MR. JUSTICE DOUGLAS, concurring in the judgment.

The petitioner in this case, charged with a felony, received court-appointed counsel, which is available in Oregon to a defendant who executes a statement that he is unable to obtain counsel, when it appears to the court that the defendant is without means. Ore. Rev. Stat. §§ 135.050 (1)(c), (d) (1973). Petitioner was convicted, and sentenced to five years' probation. One of the conditions of probation was that petitioner reimburse the county for the cost of his appointed attorney's fees and for the expenses of a defense investigator.<sup>1</sup> These costs were

<sup>1</sup> In this case, the petitioner's father apparently paid the costs, and petitioner will repay his father.

assessed pursuant to the Oregon recoupment statute, §§ 161.665-161.685, which authorizes the sentencing court to require a convicted defendant to pay certain costs<sup>2</sup> and to condition probation on such payment.

Although a defendant might have been indigent at the time of trial, the Oregon statutory scheme recognizes that at some point after trial a defendant may escape from indigency. As noted, the recoupment statute thus allows the court to require a convicted defendant to pay costs. § 161.665 (1). Payment of the costs may be made a condition of probation. § 161.675 (2). But it forbids the court to impose such a requirement at the time of sentencing unless the defendant at that time "is or will be able to" pay those costs and requires the court to consider the "nature of the burden that payment of costs will impose" on the defendant. § 161.665 (3). Under the statute, a court which has sentenced a defendant to pay costs may remit the payment of the amount due, or modify the method of payment, if it appears that the payment will impose manifest hardship on the defendant or his immediate family. § 161.665 (4).

<sup>2</sup> The costs which can be assessed are limited by statute to those "specially incurred" by the State in prosecuting a defendant. Ore. Rev. Stat. § 161.665 (2). The Oregon Court of Appeals found that most costs on the prosecution side of the case could not be charged to a defendant, including police investigations, district attorneys' salaries, and sheriffs' salaries. 12 Ore. App. 152, 157, 504 P. 2d 1393, 1396. Also, jury fees and the costs of summoning jurors cannot be charged to the defendant. *Ibid.*; see Ore. Rev. Stat. § 161.665 (2). The costs which can be charged appear limited to those incurred for a defendant's benefit, such as defense counsel, defense investigators, and so on, which would be borne by a non-indigent defendant in a criminal trial. In addition, the Oregon statutory scheme places limits on the fees which an appointed counsel can receive, except in "extraordinary circumstances," thus limiting the eventual responsibility of a defendant under the recoupment statute. Ore. Rev. Stat. § 135.055.

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The Court of Appeals of Oregon construed the statutory scheme in this case to limit sharply the discretion of the trial court to require the repayment of costs. 12 Ore. App. 152, 504 P. 2d 1393. As the court interpreted the statute, a defendant can be required to repay appointed counsel's fee "*only if and when he is no longer indigent.*" *Id.*, at 159, 504 P. 2d, at 1397 (emphasis added). While payment of costs may be made a condition of probation, probation can be revoked only if the court specifically finds that "(1) the defendant has the present financial ability to repay the costs involved (either all or by installments) without hardship to himself or his family . . . and (2) the defendant's failure to repay . . . is an intentional, contumacious default . . ." *Ibid.* Revocation is improper if both of these elements are not established.

The narrow construction of the Oregon recoupment statute in this case disposes of petitioner's claim that the statute "chills" the exercise of the right to counsel. Repayment cannot be required until a defendant is able to pay the costs, and probation cannot be revoked for nonpayment unless there is a specific finding that payment would not work hardship on a defendant or his family. Under these circumstances, the "chill" on the exercise of the right to counsel is no greater than that imposed on a nonindigent defendant without great sums of money. Even though such a defendant can afford counsel, he might well be more ready to accept free appointed counsel than to retain counsel himself. Yet a State is not therefore required by the Federal Constitution to provide appointed counsel for nonindigent defendants.<sup>3</sup>

<sup>3</sup>Indeed, while a defendant who is not indigent at the time of trial must pay counsel fees even if acquitted, the Oregon recoup-

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Nor is it a denial of equal protection to assess costs only against those defendants who are convicted. The acquitted defendant has prevailed at trial in defending against the charge brought by the State. It is rational that the State not recover costs from such a defendant while recovering costs from a defendant who has been found guilty beyond a reasonable doubt of the crime that necessitated the trial. Similarly, too, it is rational not to assess defendants against whom charges have been dismissed, since the State has not proved its charges against them.\*

My Brother MARSHALL argues that the Oregon recoupment statute denies indigent defendants equal protection of the laws in that it contemplates revocation of probation and subsequent imprisonment for nonpayment of counsel fees. He notes that Art. 1, § 19, of the Oregon Constitution provides that "[t]here shall be no imprisonment for debt, except in case of fraud or absconding debtors," and argues that a defendant who failed to pay a bill to his retained counsel could not be imprisoned.

I do not believe that this claim was properly preserved below or is properly before this Court. Petitioner did argue that the possibility of imprisonment for debts owed the State under the recoupment statute denied him equal protection, but there is no indication that the Oregon Court of Appeals was alerted to the problems

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ment statutes do not permit the assessment of costs against a defendant who is not convicted.

\* Petitioner, relying on *James v. Strange*, 407 U. S. 128, also claims that the recoupment statute is impermissible because it fails to provide the same exemptions from execution provided other Oregon debtors. The Oregon Court of Appeals in this case held that all exemptions provided other debtors also apply under the recoupment statute. 12 Ore. App., at 159, 504 P. 2d, at 1397. Petitioner's claim that the statute deprives him of due process was not raised below and hence is not before this Court.

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posed by Art. 1, § 19. Petitioner did not even mention the section in his brief before this Court.<sup>5</sup> Yet there is, as my Brother MARSHALL notes, an apparent inconsistency between Art. 1, § 19, and the recoupment statute. It may be, therefore, that the Oregon courts would strike down the statute as being inconsistent with the constitutional provision if they faced the issue. But on the record of this case, they have not made that determination of state law. Nor can we assume that the Oregon courts have in fact implicitly rejected the applicability of Art. 1, § 19, in upholding the recoupment statute in this case; there is no evidence that an Oregon court must, or even may, *sua sponte*, consider arguments not argued or briefed to it.

While this Court may at times adopt theories different from those urged by counsel or urged before the state courts when resolving a particular question, see *Dewey v. Des Moines*, 173 U. S. 193, 198; cf. *Stanley v. Illinois*, 405 U. S. 645, 658 n. 10, it will not pass on questions substantively different from those presented to the state courts, even when the federal claim is nominally based on the same federal constitutional clause relied on before the state courts, see *Wilson v. Cook*, 327 U. S. 474, 483-484. More crucially, the federal Equal Protection Clause could be violated in this case only if a particular construction of state law were to be adopted by the state

<sup>5</sup> The opinion of the Oregon Court of Appeals, including the dissent, does not mention Art. 1, § 19. Petitioner's equal protection argument here was based on claims that the recoupment statute did not provide the same statutory exemptions granted other Oregon debtors, discriminated against convicted defendants as opposed to acquitted defendants and defendants who had charges dismissed, and favored defendants who were sentenced to the penitentiary. The Art. 1, § 19, problem was brought to the attention of the Court only by the *amicus curiae* brief of the National Legal Aid and Defender Association.

courts. That construction was not adopted on the record before us, and we cannot simply assume that the state court would so rule and strike down the state statute on the basis of that assumption.

For these reasons, I do not reach the merits of the equal protection question presented by the dissent. And since that question is not properly before us, I believe that the Court errs in rendering an advisory opinion on the merits, an error compounded by the absence of any record below amplifying on those merits. The Court not only renders an advisory opinion; it renders it in a vacuum. The proper construction of state law, and the proper resolution of the dependent equal protection claim, would properly be raised by another litigant or by petitioner by way of collateral attack.

In view of the manner in which the application of the recoupment statute has been stringently narrowed by the Court of Appeals of Oregon and because the claim urged by the dissent is not properly before the Court, I concur in the judgment of the Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

In my view, the Oregon recoupment statute at issue in this case discriminates against indigent defendants in violation of the Equal Protection Clause and the principles established by this Court in *James v. Strange*, 407 U. S. 128 (1972). In that case we held unconstitutional under the Equal Protection Clause a Kansas recoupment statute because it failed to provide equal treatment between indigent defendants and other civil judgment debtors. We relied on the fact that indigent defendants were not entitled to the protective exemptions Kansas had erected for other civil judgment debtors.

The Oregon recoupment statute at issue here similarly provides unequal treatment between indigent defendants

and other civil judgment debtors. The majority obfuscates the issue in this case by focusing solely on the question whether the Oregon statute affords an indigent defendant the same protective exemptions provided other civil debtors. True, as construed by the Oregon Court of Appeals, the statute does not discriminate in this regard. But the treatment it affords indigent defendants remains unequal in another, even more fundamental, respect. The important fact which the majority ignores is that under Oregon law, the repayment of the indigent defendant's debt to the State can be made a condition of his probation, as it was in this case. Petitioner's failure to pay his debt can result in his being sent to prison. In this respect the indigent defendant in Oregon, like the indigent defendant in *James v. Strange*, is treated quite differently from other civil judgment debtors.

Petitioner's "predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense." 407 U. S., at 136. Article 1, § 19, of the Oregon Constitution provides that "[t]here shall be no imprisonment for debt, except in case of fraud or absconding debtors." Hence, the nonindigent defendant in a criminal case in Oregon who does not pay his privately retained counsel, even after he obtains the means to do so, cannot be imprisoned for such failure. The lawyer in that instance must enforce his judgment through the normal routes available to a creditor—by attachment, lien, garnishment, or the like. Petitioner, on the other hand, faces five years behind bars if he fails to pay his "debt" arising out of the appointment of counsel.

Article 1, § 19 of the Oregon Constitution is representative of a fundamental state policy consistent with the modern rejection of the practice of imprisonment for debt as unnecessarily cruel and essentially counterproductive.

Since Oregon chooses not to provide imprisonment for debt for well-heeled defendants who do not pay their retained counsel, I do not believe it can, consistent with the Equal Protection Clause, imprison an indigent defendant for his failure to pay the costs of his appointed counsel.<sup>1</sup> For as we held in *James v. Strange*, a State may not "impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor." 407 U. S., at 138.

I would therefore hold the Oregon recoupment statute unconstitutional under the Equal Protection Clause insofar as it permits payment of the indigent defendant's debt to be made a condition of his probation.<sup>2</sup> I respectfully dissent.

<sup>1</sup> The majority argues that we have recognised no constitutional infirmity in imprisoning a defendant with the means to pay a fine who refuses or neglects to do so. *Ante*, at 53 n. 12. This case does not involve a fine, however, but rather enforcement of a debt for legal services. The fact remains that Oregon imprisons a defendant with appointed counsel who refuses or neglects to pay his debt for legal services even though able to pay, but does not imprison a defendant with retained counsel in the same circumstances.

<sup>2</sup> In light of my disposition of the equal protection claim, I have no occasion to consider petitioner's contention that some other defendant's knowledge that he may have to reimburse the State for providing him legal representation might impel him to decline the services of an appointed attorney and thus chill his Sixth Amendment right to counsel. In any event, in my view such a claim could more appropriately be considered by this Court in the context of an actual case involving a defendant who, unlike petitioner, had refused appointed counsel and contended that his refusal was not a knowing and voluntary waiver of his Sixth Amendment rights because it was based upon his fear of bearing the burden of a debt for appointed counsel or upon his failure to understand the limitations the State imposes on such a debt.